MARINE MAMMAL PROTECTION ACT—PART II

Y 4.M 53:103-57

Marine Mannal Protection Act-Part 2...

SUBCOMMITTEE ON ENVIRONMENT
AND NATURAL RESOURCES

OF THE

COMMITTEE ON
MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

H.R. 2760

A BILL TO AUTHORIZE THE MARINE MAMMAL PROTECTION ACT FOR A PERIOD OF 6 YEARS, TO ESTABLISH A NEW REGIME TO GOVERN THE INCIDENTAL TAKING OF MARINE MAMMALS IN THE COURSE OF COMMERCIAL FISHING OPERATIONS, AND FOR OTHER PURPOSES.

AUGUST 4, 1993

Serial No. 103-57

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MARINE MAMMAL PROTECTION ACT—PART II

WEDNESDAY, AUGUST 4, 1993

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES, COMMITTEE ON MERCHANT MARINE AND FISHERIES,

Washington, DC.

The Subcommittee met, pursuant to call, at 10:13 a.m., in room 1334, Longworth House Office Building, Hon. Gerry E. Studds [chairman of the Subcommittee] presiding.

Present: Representatives Studds, Hochbrueckner, Unsoeld, Furse, Hamburg, Tauzin, Saxton, Young, and Manton.

Staff Present: Jeff Pike, Staff Director, Full Committee; Tom Kitsos, Senior Policy Analyst; Sue Waldron, Press Secretary; Karen Steuer and Tod Preston, Professional Staff; Lesli Gray, Clerk; Leigh Ann Clayton, Staff Assistant; Vernita Brewington, Laurel Bryant, Rod Moore, JayneAnne Rex, Jill Brady and Tom Melius, Minority Professional Staff; and Margherita Woods, Minority Clerk.

Mr. STUDDS. The Subcommittee will come to order.

STATEMENT OF THE HON. GERRY E. STUDDS, A U.S. REPRESENTATIVE FROM MASSACHUSETTS, AND CHAIRMAN, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. STUDDS. Of all the issues that come before us, none generates as much emotion in either its detractors or its supporters as the Marine Mammal Protection Act. From its inception, today's issue—the effort to minimize incidental takes of marine mammals in commercial fisheries—has been one of our greatest challenges.

In 1988, this Committee responded to the now-famous Kokechick court decision by granting our fishing industry a five-year exemption from the take prohibitions of the Act. Our intention then was to give the National Marine Fisheries Service, the Marine Mammal Commission, the industry and the environmental community time to collect better data on interactions between fisheries and marine mammals, experiment with alternative fishing gears, talk to each other and come up with some bright ideas.

Frankly, we haven't come as far as we would have liked on these issues at this point. We still don't know all we should about marine mammal populations or incidental take mitigation. Seals and sea lions are smack in the middle of a tremendous controversy over endangered and threatened salmon stocks in the Pacific Northwest.

While the harbor seal population in Maine is healthy and increasing, harbor seals in Alaska waters are on the decline. Dolphin stocks on the west coast seem to be in great shape, but east coast

harbor porpoise are being considered for threatened status under the Endangered Species Act.

We have just removed gray whales from the endangered list, but the North Atlantic right whale continues in its infamous position as the most endangered of the great whales in the world.

I, for one, do not want to be here hashing out solutions again in five years. In 1998, those of us who remain should be holding oversight hearings on how well the 1993 amendments have fulfilled the goals of the MMPA. In this spirit, I intend to reserve my support for a management regime that will work for both fishermen and marine mammals for years to come.

Last year, NMFS proposed a new management approach. There were a number of objections. In June, a coalition of 31 fishing organizations and seven environmental groups presented us with their proposal. It doesn't resolve everyone's concerns either.

In an effort to focus discussion, Mr. Young, Mr. Fields, Mr. Saxton, Mr. Manton and I introduced H.R. 2760 two weeks ago. Many of you objected to our proposal to bring the bill to markup tomorrow, and we have decided not to do so.

But time is growing short. The September 30 deadline will be upon us before we know it. In the intervening month, Congress will be in recess, this Committee is holding field hearings and many Members will be spending time in their districts.

But regardless of the looming deadline, what this Committee will not do is pass a management regime that doesn't work and brings us all back here again five years from now. So we have work to do.

Mr. STUDDS. The gentleman from New Jersey.

STATEMENT OF THE HON. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Mr. SAXTON. Thank you, Mr. Chairman. I have a statement which I would like to submit for the record.

I know this is a contentious issue and I know that emotions run high among those who are concerned about it. I know that there are those who have an economic stake in this issue, and I also know that there are people who have legitimate environmental concerns, so it is, in the very least, contentious and emotional.

Yet it falls upon the shoulders of this Committee and it is clearly our responsibility to come up with some kind of a solution which addresses the problems of pollution, habitat destruction, predator-prey relationships, international influences and natural cycles which we do not yet fully understand. These are all challenges which have to receive our attention, and I believe they will.

I would just conclude by asking everyone to make an extra effort to cooperate with the Committee Chairman and with me, the Ranking Member, as we try to arrive at some conclusions and make some decisions that will work to everyone's interest, hopefully, in the future.

Thank you, Mr. Chairman.

[The statement of Mr. Saxton follows:]

STATEMENT OF HON. H. JAMES SAXTON, A U.S. REPRESENTATIVE FROM NEW JERSEY, AND RANKING MINORITY MEMBER, SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

Well, Mr. Chairman, here we go again.

Despite the high emotions which continue to surround the issue of incidental interactions between marine mammals and commercial fishing operations, I hope I can say we are closer today to implementing a permanent regime which will be mutually supported.

I also hope that in 5 years when we come back for reauthorization that this issue will have been made moot.

I don't think I am alone in expressing my frustration at the high profile this issue continues to receive and my fear that it may be at the expense of directing our resources and the public's attention away from solving the more insidious causes of marine mammal population declines.

Pollution, habitat destruction, predator-prey relationships, international influences, and natural cycles which we do not yet understand are cultural challenges which have not received the attention they deserve within the MMPA.

As the Chairman said, the bill under consideration today is intended to generate discussion and comment. It is a good faith effort to incorporate the many concerns and more workable suggestions which have been submitted to this Committee—some of which were submitted in only the last 2 months. It is our every intention to meet the October 1 deadline. I hope our good intentions will be reciprocated by those interests represented here today.

I look forward to hearing the many comments and suggestions from the witnesses and working to establish a final solution so we can begin to focus on the more complicated factors plaguing our marine ecosystems and their resources.

Thank you, Mr. Chairman.

Mr. STUDDS. I think that was a personal plea. We don't want to have to deal with this for the next decade.

Without objection, the statement of the gentleman from Texas, Mr. Fields, will be made a part of the record.

[The statement of Mr. Fields follows:]

STATEMENT OF HON. JACK FIELDS, A U.S. REPRESENTATIVE FROM TEXAS, AND RANKING MINORITY MEMBER, COMMITTEE ON MERCHANT MARINE AND FISHERIES

Mr. Chairman, I am pleased that you have scheduled this hearing on H.R. 2760, a bill to reauthorize key provisions of the Marine Mammal Protection Act.

In 1988, Congress enacted legislation establishing a 5-year interim exemption from the Act's prohibition on the taking of marine mammals during commercial fishing operations. Since this exemption expires on October 1, 1993, it is essential that we move this bill in an expedited manner so that there are not major disruptions to thousands of our nation's fishermen.

Over the past 8 months, the commercial fishing industry and conservation groups have been working to develop a scheme to manage the interaction of commercial fishing activities with marine mammals. With the assistance of a professional facilitator, a number of these groups reached an agreement and their negotiated proposal was submitted to Congress on June 10 of this year.

The Marine Mammal Protection Act amendments of 1993, which I have cosponsored, incorporates many of the suggestions of the negotiated proposal including the establishment of a scientific working group, regional conservation teams, incidental take permits, and the establishment of a Pinniped Interaction Task Force.

The intention of this bill is not to overburden an already overregulated industry, but, rather, to use good science to reduce the mortality rate of marine mammals. Furthermore, action must be taken to avoid having any of these mammals listed as threatened or endangered under the Endangered Species Act.

Additionally, it is important to note that this bill creates advisory panels to provide economic and scientific expertise to the Secretary of Commerce. This advice is critical in order to make rational decisions based on science and sound wildlife management practices, rather than emotions and morality.

Finally, commercial fishermen who do interact with marine mammal stocks that are critical are not assigned an individual quota for allowable takes of those stocks. Therefore, the industry has an incentive to work together to reduce total takes of marine mammals.

Since the specifics of this bill have been articulated by the Chairman, I will not repeat them here. Nevertheless, let me point out that while this bill *only* addresses the "fish fix," I look forward to reviewing other provisions of the Marine Mammal Protection Act in the very near future.

Thank you, Mr. Chairman.

Mr. STUDDS. We will ask all seven of the witnesses to come forth in harmony and unity as a single panel. If you would proceed to the table, identify your nameplate at the witness table and take a roost behind it. OK, you are all there. There appears to be relative unison and harmony to me.

We are going to treat you as a single panel and hear each of you before we go to questioning. I assume you have been alerted by staff, if you have not been here before, to our system of lights. We are going to ask you to confine your oral testimony to no more than five minutes. Your written testimony will appear in its entirety in the record.

The yellow light indicates you have one minute remaining, and the red light will indicate that you have concluded. We apologize for the necessity for this, but it really is essential, given the interruptions and the constraints on our time.

Mr. STUDDS. We will begin with Dr. Nancy Foster, Acting Director of the National Marine Fisheries Service.

Dr. Foster, welcome.

STATEMENT OF NANCY FOSTER, ACTING DIRECTOR, NATIONAL MARINE FISHERIES SERVICE

Ms. FOSTER. Thank you.

Mr. Chairman and Members of the Subcommittee, I am very pleased to be here to comment on this Committee bill. It is pretty obvious to anyone who reads it that the Committee has worked very hard and worked under a tight deadline to produce this bill. It is also obvious that it has drawn from all of the legislative proposals before you. Hopefully, we will find that it has picked the best parts.

We find, in general, that the Committee bill is basically sound. We think it is reasonable, and we think it is workable.

However, as usual, we do have several concerns. Some of the concerns we have are easily dealt with, and others, while more difficult, we believe they are not impossible to overcome. If we can address the concerns that I will mention here today and that are mentioned in my full testimony, I think the Fisheries Service can certainly support this bill.

I would like to touch briefly on what we think are the more significant concerns.

First, what we call shifting the burden of proof or shifting the burden of conservation. Much like the negotiated proposal, we find this bill provides the general authorization to fishermen to take marine mammals. This general authorization is unlike the process that we have in place for all other user groups. It shifts the burden away from the fishing industry to the government for the conservation of marine mammals. We believe this is a fundamental change in the MMPA, and it has caused us a great deal of concern.

Nonetheless, we have had numerous meetings on this issue inside the Service. We feel that it could be something that the

Agency would be able to accept if certain provisions could be included in the bill. For example, if there were a statement in the bill, something to the effect that the Secretary should err on the side of conservation of the marine mammals in instances where decisions are based upon insufficient information.

Also, we think that the Secretary should have the authority to take away a fisherman's authorization if the individual is convicted of a violation of the management regime. In such instances, the authorization could then be reinstated under a permit where the person applies, the Secretary reviews in consultation with the Marine Mammal Commission, and there is public comment.

Under this kind of a system the person could then continue to take marine mammals under that permit for a given period of time, and, if there were no further violations, the general authorization could be reinstated. We think this provision would be much more consistent with the process that all other user groups have to follow in order to obtain authorization to take marine mammals.

The second point is a technical but significant point because it deals with the MMPA and ESA. We think that under the bill authorizing takes of endangered marine mammals under Section 101(A)(4) it would still be inconsistent with Section 7 of the Endangered Species Act because the ESA specifies that incidental taking of threatened and endangered species of marine mammals has to be authorized under Section 101(A)(5) of the MMPA. As I said earlier, I think this is just a technical problem that would be easy enough to fix.

Our third major concern is vessel registration. We have long believed that all vessels that interact with marine mammals, whether with critical, endangered, threatened, depleted or noncritical stocks, should register.

We also believe that the existing bill calls for information that is going to be impossible for us to collect unless we register all vessels that interact with marine mammals.

I will give an example. For instance, the bill calls for assessment reports for all stocks of marine mammals, and these assessments reports require an estimate of the number of vessels in the interacting fisheries. But the bill only requires registration for those interacting with critical stocks. It would be impossible for us to do this without registering other vessels.

I could give other examples. The point is that we think registration of all these vessels is critical to our avoiding being here in the same situation five or six years from now when our information is then out of date.

We don't mean to imply that the vessel registration for these groups that interact with noncritical stocks has to be as rigorous as the registration that is required for the others. For example, fishermen could register once and thereafter all they would have to do is keep us informed of changes in the situation—if they sell their boat, if they leave the fishery, or if they move into another fishery, this kind of thing.

Also, those fisheries that are registering that do not interact with critical stocks would not necessarily have to pay the registration fee. So you could make it very simple and easy for those folks.

The fourth thing I would like to mention is triggering emergency regulations. The bill authorizes the Secretary to develop and implement emergency regulations if we find that the incidental taking of marine mammals in a fishery might exceed the potential biological removal. We think it makes a lot more sense to say that the Secretary would make that decision when he considers lethal takes in all fisheries and in all other activities that are lethally taking marine mammals. It is very unlikely that a single fishery would exceed a PBR, and the PBR actually includes everybody and every activity that is taking marine mammals.

Mr. STUDDS. I apologize, but your red light is on.

Ms. FOSTER. Thank you very much. I will be glad to answer questions.

Mr. STUDDS. You are such a nice witness. Thank you. That is the most cheerful conclusion we have had in months.

[The statement of Ms. Foster can be found at the end of the hearing.]

Mr. STUDDS. Next, Dr. Robert Hofman, Scientific Program Director of the Marine Mammal Commission.

STATEMENT OF ROBERT J. HOFMAN, SCIENTIFIC PROGRAM DIRECTOR, MARINE MAMMAL COMMISSION

Dr. HOFMAN. Thank you.

Mr. Chairman, Members of the Committee, I have provided a written statement describing a number of uncertainties concerning the proposed legislation and how they might be resolved. The principal uncertainties, in our view, relate to the long-term issues. We share many of the uncertainties and concerns raised by Dr. Foster and by you, Mr. Chairman.

Our goal as well is not to be revisiting this in five years, so I think it really is the long-term issues that we are most concerned about.

The proposed legislation, as we understand it, would require fishermen to report all lethal taking of marine mammals following completion of each fishing trip during which a take occurred. It would require that the National Marine Fishery Service establish a monitoring program to verify the accuracy of the reports and to detect changes in the affected marine mammal stocks, with particular emphasis on stocks determined to be critical.

The legislation would authorize the National Marine Fisheries Service to place observers on a representative subset of fishing vessels to obtain statistically reliable information on marine mammal catches.

It would require biennial registration of all vessels engaged in fisheries that have been determined through the present Interim Exemption Program to take endangered, threatened or depleted species or species which will be identified under the new regime as being critical.

There appears to be no requirement and no means provided in the proposed legislation to monitor the numbers of vessels engaged in fisheries that are not now known to take depleted species or stocks, or stocks which will be identified as critical under the new regime.

Likewise, there appears to be no requirement and no means provided in the legislation to obtain effort, location and other data from vessels engaged in fisheries for which they are not required to register.

Also, there appears to be no explicit requirement to monitor the size or vital rates of any of the potentially affected marine mammal stocks, including those which are determined to be critical.

Consequently, it is questionable whether the proposed legislation would ensure in the long run that incidental taking in commercial fisheries does not cause any marine mammal species or population stock to be reduced below its optimum sustainable population level.

The proposed legislation specifies the criteria to be used to estimate the potential biological removal level, the PBR, for stocks that are depleted and for stocks of unknown or uncertain status. The criteria, in our view, are appropriately conservative and, if adopted, will provide reasonable certainty that taking kept at or below the estimated PBR level would not cause the affected stocks to be reduced or to be maintained below their maximum net productivity level.

However, the proposed legislation does not specify the criteria that should be used to calculate the Potential Biological Removal level for stocks determined to be within their optimum sustainable population range. Likewise, it does not specify the procedure that would be used to determine whether a stock is within its Optimum Sustainable Population range.

At present, the Marine Mammal Protection Act requires that OSP determinations be made through formal rulemaking. In cases where stocks are determined to be within their OSP range, it authorizes take levels which could be much higher than could be authorized using the proposed criteria for establishing PBR levels for stocks of unknown or uncertain status.

Thus, continuation of the present system for making OSP determinations and determining levels of take that could be authorized from stocks within their OSP ranges would provide an incentive for obtaining the information necessary to determine whether a stock of unknown or uncertain status is actually within its OSP range.

To make this incentive clear, the Commission believes it would be desirable to specify in the legislation that the PBR level for stocks determined to be within their optimum sustainable population range is the level that can be sustained without causing the stock to be reduced below its maximum net productivity level.

The Commission also believes that it would be desirable and appropriate to specify that stocks will be assumed to be below their MNP level and that the PBR level will be calculated accordingly until a formal determination is made that a stock is within its Optimal Sustainable Population range.

The proposed legislation would establish eight regional conservation teams. The regional approach makes sense in that a number of affected marine mammal stocks are taken incidentally in more than one fishery and the fisheries are generally managed on a regional basis. However, it is not clear how the regional teams would deal with situations when the affected stocks migrate between, or have ranges which include, two or more regions.

Also, it is not clear whether the regional teams would be responsible for considering and providing advice to the Secretary on activities other than commercial fisheries that may be affecting or posing threats to marine mammals.

In summary, the Commission, like the National Marine Fisheries Service, I think, believes that the proposed legislation, with some clarification, would be both workable and reasonable, at least in the short-term.

In the long-term, however, I think some revision, as well as some clarification, would be necessary to ensure that adequate protection of marine mammals will be provided and at the same time minimize hardship on fisheries.

I see the red light is on, and I just made it.

Mr. STUDDS. Thank you.

[The statement of Dr. Hofman can be found at the end of the hearing.]

Mr. STUDDS. We are going to suspend for one moment in order to hear a brief and undoubtedly tranquil statement from one of the great terrestrial mammals, the gentlemen from Alaska.

STATEMENT OF THE HON. DON YOUNG, A U.S. REPRESENTATIVE FROM ALASKA

Mr. YOUNG. I am sure some in the audience would like to make me an endangered species, not just put me on the endangered species list.

Mr. Chairman, I want to congratulate the panel. First, my congratulations to those also who spent many months negotiating this compromise. I know it wasn't easy. I know there were many concessions made on all sides. However, I think the agreement is a good agreement.

Second, with regard to our bill, it is not perfect. We know that. The staff on both sides of the aisle have tried very hard to write a bill that reflects the agreement that was reached. Where the bill is different, it is mainly due to lack of time available. In some cases there are infusions of what your compromise intended.

There was no deliberate attempt by the staff to undermine your agreement or to push different agendas.

We do want your comments. That is why we are having this hearing. What we don't get today, we welcome in writing, phone calls or meetings. I expect the staff of this Committee will not get a summer vacation this year because they will be working on this bill. However, we want cooperation from the interested parties, not a lot of unnecessary yelling and screaming or agitation. I am not trying to achieve any goal but what we are trying to do in this legislation.

Finally, a word about the process. The markup tomorrow has been canceled because too many people complained. I understand their concern. Remember, though, we have to get a bill signed by the President by September 30th or the entire U.S. fishing industry is at risk. I hope the witnesses will work toward that goal.

If it looks like we cannot get a final bill by then, I am prepared to introduce a bill to extend the existing fisheries exemption. I

hope, Mr. Chairman, that if this becomes necessary we will have your support and the support of the negotiating groups.

Several years ago, the National Marine Fisheries Service kept 2,000 fishermen and processing workers in Alaska out of work for six months, working people, because of a threatened lawsuit by an environmental group regarding fishing interactions with marine mammals. I am not going to have my people thrown out of their jobs again. We are going to have a bill on the President's desk or we will just extend what we have.

So I am asking all of you at the witness table, try to work with our staffs and come out with a final agreement. It is necessary to protect the marine mammals and also necessary to protect, I believe, a vital part of our economic life and also the well-being of our people and the fisheries of this Nation.

From coast to coast it is important that the fisheries also be recognized as well as the marine mammals. We will work together and we will work with you to, I hope, achieve our goal by the date certain. Thank you, Mr. Chairman.

Mr. STUDDS. I thank the gentleman for his usual tranquility. I also want to thank the gentleman for granting safe passage to Alaska for this Committee later this month.

Mr. YOUNG. You better get a bill or you will never get back.

Mr. STUDDS. We appreciate that.

Mr. STUDDS. We will resume with Ms. Suzanne Iudicello, Senior Program Counsel for the Center for Marine Conservation.

STATEMENT OF SUZANNE IUDICELLO, SENIOR PROGRAM COUNSEL, CENTER FOR MARINE CONSERVATION

Ms. IUDICELLO. Thank you, Mr. Chairman.

Good morning. After the exhortation from the Congressman from Alaska, I will get my remarks right to the point of working with your bill and moving on to a successful conclusion by September 30th.

The Center for Marine Conservation served as the coordinator for the environmental groups that participated in negotiations with the fishing industry and who endorsed the negotiated proposal that was submitted to you in June.

Those groups are the Animal Protection Institute, Friends of the Sea Otter, Greenpeace, National Audubon Society, The Marine Mammal Center and the World Wildlife Fund.

I would like to preface my remarks by thanking the Committee for your encouragement to us to work together to find a common ground. It is not very often that adversaries like the environmental community and the fishing industry take the time to figure out once we walk a mile in each others' shoes, maybe we can make each other part of the solution instead of part of the problem.

This Committee has encouraged our working together on issues as early as the early 1980's with the driftnet legislation. We hope that this work on the MMPA this year is just one more milestone in many miles yet to go.

It goes without saying that all of us who are interested in this reauthorization are well aware of the approaching deadline. We applaud the Committee for your swift drafting, development and in-

troduction of legislation. We look forward to working with you to further refine the House bill so that it accomplishes the objective we all hold, which is to protect marine mammals while allowing commercial fishing to continue.

I must say, though, that we are relieved that you have slowed down the pace a little bit. We believe that while the House bill provides a good start, there are a number of concerns that deserve some deliberate and thoughtful attention that we feared there was not time for if you had gone to markup tomorrow. So we thank you for allowing the time for this dialog to continue.

Rather than summarize our written statement which does have some specifics in it, I would like to highlight several areas where we think we can work with you and the staff to narrow the differences between the bill and the joint proposal.

They fall into three categories or bundles of issues. The first are the most difficult. Just as Dr. Foster said, we have some big issues and some little issues. The first are fundamental differences in approach.

The second are some issues that are mostly procedural in terms of timing.

The third are substantive differences on specific issues.

In the first area, we are concerned that the House bill does not integrate two most important thrusts that came out of our negotiated approach, namely to put priority attention on real problems and, secondly, to reduce incidental takes over time.

We believe that the scope of the regulatory requirements of the bill can be narrowed so that they focus attention and scarce resources on marine mammal stocks that deserve our immediate and critical attention. We think this can be accomplished with greater precision in how we define the stocks and a more realistic approach on how we pull fisheries into the program and by adopting a mechanism to set priorities.

In relation to this issue, we are also concerned that the House bill appears on first read to be a quota-based regime. You are setting a PBR that is a ceiling that we seem to be shooting up toward instead of having a goal of reducing mortality over time to levels or rates approaching zero.

Because there don't appear to be prohibitions on acts in the bill, that is, there doesn't seem to be a prohibition on exceeding PBR or a prohibition on not meeting a benchmark, the penalties are for administrative violations. So the whole mix seems to be to register a whole lot of vessels and then punish them for failing to complete paperwork.

The last point in these fundamental issues is the prohibition on intentional shooting of marine mammals. We think this is a real problem. In some fisheries intentional shooting is a greater source of mortality than entanglement in gear. We think it is fundamentally in opposition to the policies and purposes of the act. A great segment of the fishing industry has agreed to abide by a prohibition on the practice, and we hope that you will do so, also.

In the procedural area, the major differences between the House proposal and the negotiated proposal have to do with timing. We think those are minor issues that can be worked out with very little problem with the staff.

Finally, we would like to urge the Committee to examine the record of the Marine Mammal Exemption Program that has been in place for the last five years. We took a hard look at it and we learned a number of lessons from it that we tried to integrate into our proposal. They are these:

Education appears to be more effective than enforcement in bringing participants into a program and keeping them in compliance. So we would like to make people part of the solution and urge you to integrate that into your proposal.

Next, while observers contribute significantly to our understanding of the nature of interactions, we have very limited resources, and we should also give ourselves the opportunity to use alternatives to on-board observers.

There are a number of other smaller issues which we will provide to the Committee in writing.

We thank you for this opportunity. We look forward to working with you to bring this bill to conclusion by the deadline.

Mr. STUDDS. Thank you.

[The statement of Ms. Iudicello can be found at the end of the hearing.]

Mr. STUDDS. Next, Mr. Brad Gilman, General Counsel, Gulf of Alaska Coalition.

STATEMENT OF BRAD GILMAN, GENERAL COUNSEL, GULF OF ALASKA COALITION

Mr. GILMAN. Thank you, Mr. Chairman.

I have submitted my written comments for the record. I would like to start out by responding to some of the comments I have heard today. First with respect to Mr. Saxton and Mr. Young.

I do not believe that this is a contentious and emotional issue. I think everybody at this table has been talking for nine or ten months. We all agree on the general goals that need to be accomplished under MMPA. We need an effective mammal conservation regime. We need an effective regime to encourage the reduction in accidental takes in commercial fishery, and we need to eliminate the right to shoot animals off the stern deck. Those are fundamental agreements that get lost in the confusion over how to technically draft the bill.

That is really what we are doing right now, in the next two months, coming to an agreement on a technical draft of a bill that will work and how to prioritize the use of our resources in an effective manner. So, I personally don't think we have in an emotional confrontation. This is something we can work out in the next 60 days.

Second, we oppose the Fisheries Service concept that you need to develop a permitting regime to regulate accidents in the commercial fishing industry. This has never been, as a practical matter, the tool used by the MMPA on accidental takes.

Prior to the Kokechick decision, you had to submit a permit request for small takes. This was a pro forma thing. It was submitted by associations and large groups. It was done as a matter of course. There was no burden to bear really. Maybe there was a theoretical and abstract burden under the law, but it was no real true burden.

After Kokechick, as part of the 1988 amendments, there was no burden. You didn't impose any burden on the fishing industry.

So what the government is asking you to do now is to take the MMPA and make it into a permitting process for which it has never been as a practical matter, and to condition the right to fish, even in State-regulated fisheries, on compliance with any of the components of the conservation regime, including administrative compliance, decals and that sort of thing.

We are opposed to that. We believe in a general legislative authorization to fish. We believe in a system that gives the Secretary of Commerce the regulatory authority to make sure that the statutory requirements of the act are being complied with through the use of civil penalties. And we believe in maximizing participation in the regions to build regional consensus.

Third, you have to be very careful. You have provisions in Section 118 of the act that is going to regulate accidental takes. Yet the sources of takes are more than the fishing industry.

The NMFS numbers and the analyses that have been performed by the Center for Marine Conservation and others have indicated in the vast majority of fisheries there are very few accidental takes of marine mammals, period. To the extent that you give the Secretary emergency regulatory authority to impose emergency regulations when the total take is above PBR, but you have only the authority to regulate fishermen under Section 118, you are stuck in a situation where you are going to have to regulate the de minimis takes and let the other sources of takes go by the wayside. That is fundamentally unfair to the fishing industry and won't solve the problem.

Four, we believe that a long-term conservation program must be capable of surviving the vagaries of Federal funding in the era of deficit reduction. We want this money, the Federal money, $10 million per year to go to population assessments so we have good data instead of unknown data, for federally funded observers to be put in the hot spot areas. We want to have statistically reliable information. We want to fund conservation teams so that we can build regional consensus and avoid confrontation.

We don't believe that this funding should be channeled into the development of a centralized system to register fisheries across the board throughout the regions. This is something that, if they are concerned about fishing efforts for fishing efforts' sake, this can be done through the Magnuson Act.

We have systems in place in the Pacific Northwest and the west coast that have detailed fishing effort systems and those systems have been used in the last few years to do analysis on marine mammal fishery interactions. So you do not need to channel your scarce resources to do centralized systems.

The rest of my comments are in writing, and I will not cover them at this point.

Mr. STUDDS. Thank you.

[The statement of Mr. Gilman can be found at the end of the hearing.]

Mr. STUDDS. Next, Mr. John Gissburg, Legal Counsel to the Commissioner of the Department of Fish and Game, State of Alaska.

STATEMENT OF JOHN GISSBURG, LEGAL COUNSEL TO THE COMMISSIONER OF THE DEPARTMENT OF FISH AND GAME, STATE OF ALASKA

Mr. GISSBURG. Thank you, Mr. Chairman and Members of the Committee.

This morning I will summarize three of the several topics that are covered in our written testimony: one, incidental takes of critical stocks; two, vessel registration and data collection; and, three, monitoring of marine mammal/fisheries interactions.

First, the incidental take by commercial fisheries of marine mammals needs to be addressed again by the Congress. The Interim Exemption enacted in 1988 was designed to allow the National Marine Fisheries Service to measure incidental take levels and assess the status of marine mammal stocks.

However, after five years and some $30 million focus on trying to answer to the detailed and comprehensive system of regulating marine mammal fisheries interactions, that approach is failing to focus on the true problem areas, is lacking in basic population data, is unduly complex, costly, and is duplicative. In Alaska the NMFS methodology has failed to identify some marine mammal stocks that are either in trouble or that have significant interactions with fisheries.

Since the act was first passed, Congress has recognized the complexity of the issue and that it is inevitable that marine mammals will interact with fishing. Therefore, mechanisms have been provided to allow some take of marine mammals during the conduct of coastal fisheries.

For example, the interim exemption enacted in 1988 was designed to allow the National Marine Fisheries Service to measure incidental take levels and assess the status of marine mammal stocks. However, after five years and a $30 million focus on trying to institute a detailed and comprehensive system of regulating marine mammal/fisheries interactions, the approach is failing to focus on true problem areas, is lacking in basic population data, is unduly complex, costly and is duplicative.

Thus, in Alaska, the NMFS methodology is failing to identify some marine stocks that are either in trouble or that have significant interactions with fisheries. An example would be the omission of harbor seals from the NMFS list of critical stocks.

At the same time, the NMFS methodology included some species in Alaska that are not in trouble.

Second, with regard to the vessel registration system being proposed, Alaska and other States already have comprehensive systems to track and record the extent of fishing in State-regulated fisheries.

Further, under the MFCMA, the Federal Government, too, has similar systems in the Federal EEZ off Alaska.

In Alaska, there are two parts to this system:

First, registration requirements giving permits to vessels and operators by species, location of fishery, gear type and season of operation.

Second, there are reporting requirements that provide statistical information on all statewide fishing catches.

Additional input comes from on-board observers.

Creating a new and overlapping system just for marine mammals would be duplicative and unnecessary and would be contrary to the requirement of provision (f)(2)(D) in your act to minimize costs and avoid duplication.

Three, concerning monitoring of incidental takes of marine mammals, we do not believe there should be a legislatively mandated level of observer coverage for marine mammals only. Let's take advantage of the existing programs: In the north Pacific Ocean in 1992 there were 681 observers on groundfish vessels operating in the EEZ while the State of Alaska had observers dispatched on 106 crab fishing trips totaling 4,331 days of observations.

On floating processors there were 50 deployments for over 2,000 days of sea monitoring programs. The expertise existing in these programs could and should be applied to the task of recording information on fisheries and marine mammal interactions.

Thus, instead of creating a whole new program, the conservation teams, for example, could designate fisheries for which marine mammal information is needed. The Secretary could then approve a verification regime that utilizes existing observer and data collection programs adapted, however, to the facts and circumstances of the specific marine mammal stock or stocks of interests. The data could then be collected in the course of existing observations.

In conclusion, Mr. Chairman, with more than one-half of the coastline of the United States, Alaskans have close ties to marine resources. We are determined that they be managed effectively and conserved as well. We recommend that this be done by amending the present bill to reflect the negotiated proposal more closely.

Thank you for the opportunity to present this testimony on behalf of the State of Alaska.

Mr. STUDDS. Thank you.

[The statement of Mr. Gissburg can be found at the end of the hearing.]

Mr. STUDDS. Ms. Sharon Young on behalf of the Marine Mammal Protection Coalition, and I gather some other organizations as well.

STATEMENT OF SHARON B. YOUNG, WILDLIFE CONSULTANT TO THE INTERNATIONAL WILDLIFE COALITION AND THE HUMANE SOCIETY OF THE UNITED STATES

Ms. YOUNG. Thank you, Mr. Chairman. I am a wildlife consultant for the International Wildlife Coalition, headquartered in Falmouth, Massachusetts. I appreciate the opportunity to testify today on behalf of the International Wildlife Coalition and the Humane Society of the United States and a coalition of 15 other organizations. We have submitted more detailed written testimony.

In 1988, Congress authorized a five-year interim exemption program within the Marine Mammal Protection Act. The exemption program was not intended to weaken the MMPA but rather to provide a period in which to gather data to assist in developing a regime to reduce fisheries-related mortality in marine mammals to an insignificant level approaching zero.

We are very pleased to note that this legislation largely addresses many concerns raised about previous proposals. We would like

to offer our comments which support much of this bill, but also raise concerns about some of the sections.

Small Take Provisions. We do not feel that issuance of permits to take endangered species subject to a section 7 consultation is adequately protective of endangered marine mammals. Further, the bill appears to override the ESA for threatened stocks as well.

We propose instead that no permits be issued for the taking of these animals.

We also propose that in the event a vessel accidentally kills a member of an endangered species, a mortality review panel would be convened. This panel would review all of the circumstances of the take and could recommend, where possible, methods to avoid future mortality. Penalty would accrue only if the vessel was shown to be fishing carelessly or violating previous recommendations of the review panel.

This panel could also review general practices of the fishery and could recommend against the use of certain practices or gear which by their design are likely to result in endangered species being killed.

Section 118, Authorizing the Taking of Marine Mammals. We support the proposals for the Scientific Working Groups and plans for stock assessments. We are, however, concerned with the limited registration of vessels which was proposed in that it will not be sufficient to allow NMFS to adequately identify the nature and scope of fishing activities.

While the State of Alaska may have a very important and comprehensive registration system, I can attest to the fact that that is not the case in the Northeast at all. Our knowledge of the universe of fishing is quite limited and we require this sort of system.

We believe that NMFS needs this data in order to carry out its reporting responsibilities under stock assessments and to adequately design a monitoring program to assess the level of interaction which may be occurring in order to determine if it is rising or falling or remaining the same.

The lack of a universal registry will also prevent NMFS from assessing adequate registration fees to administer the program and, furthermore, will make impossible the imposition of user or landing fees, which we feel are necessary to help support costs of the regime.

We support the use of the Regional Conservation Teams which would recommend strategies for reducing mortality. We also support the monitoring programs which are described in the bill, although we would like to suggest that some fisheries are currently subjected to rates of observer coverage higher than the 20 percent stipulated, and these fisheries should continue to be subject to increased coverage without being able to claim that it is overly burdensome and unfair.

We also believe that National Marine Fisheries Service should have authority to charge fees for more comprehensive observer coverage if that should become necessary.

We strongly support the imposition of penalties such as the loss of fishing rights for those who willfully violate provisions of the act, including reporting requirements.

Section 7, the Pinniped Interaction Task Force. While we acknowledge that there has been a growing concern with abundant pinnipeds interacting with fish stocks, we believe that provisions of this section should only be applied to those situations where pinnipeds threaten the survival of a fish stock, not to the protection of commercial interests.

We would also like to suggest that as this proposal currently exists it may be a conflict of interest to require the Secretary to both protect commercial fisheries from marine mammals and to protect marine mammals from commercial fisheries.

To deal with this conflict, we believe that the task force should not initiate deliberations on interactions but rather an application should be made to the task force by a party who could bear the burden of demonstrating that a problem exists, documenting solutions that have been tried and outlining ecosystem interactions.

It would be the responsibility of the task force to assess the application and then make appropriate recommendations to the Secretary.

Section 10, Definitions. We support the definitions of critical stocks and maximum net productivity. We would like a clarification under the definition of the PBR. We request that this be stated as the maximum number of animals which can be removed from a stock.

We further request that the legislation make clear that PBR should not be considered the maximum number that fisheries can take, but the maximum number which can be killed by all sources combined.

We also wish to see it stated that fisheries with takes within PBR must continue to decrease their rate of mortality toward the zero mortality rate goal.

With these clarifications, we strongly support the definition of PBR.

Also, we would like to address a point not raised in the proposal. We would like to ask that the Secretary make a finding at the end of four years as to whether or not the significant progress has been made toward achieving the zero mortality rate goal. And if this is not the case, regulations could be instituted to effect immediate compliance. This would help provide some missing incentive for voluntary reductions.

The MMPA was passed in 1972 in response to the desire of the public to intercede in the plight of marine mammals. At that time, commercial whaling aroused public concern. The deaths of young seals at the hands of commercial interests also aroused great concern. The tremendous loss of life of small cetaceans in the nets of the tuna industry aroused outrage.

Since 1972, a number of these concerns have been addressed. However, some of them still echo in the issues which we face today. How is widespread public affection for charismatic pinnipeds to be balanced against protection of commercial interests? How is the loss of life of marine mammals incidental to commercial fisheries to be reduced in a manner that preserves the way of life of fisheries but also preserves marine mammal stocks? We believe this legislation has gone a long way toward dealing with these pressing issues.

We strongly urge Congress and this Committee to act expeditiously to reauthorize a strong MMPA which considers our concerns and is in keeping with the original Act and the wishes of the American people.

Thank you once again for this opportunity to address the Committee. We would be happy to offer any assistance in your efforts to authorize this important legislation on a timely basis.

Mr. STUDDS. Thank you very much.

[The statement of Ms. Young can be found at the end of the hearing.]

Mr. STUDDS. Finally, Mr. Jeff Kaelin of the Maine Sardine Council.

STATEMENT OF JEFF KAELIN, EXECUTIVE DIRECTOR, MAINE SARDINE COUNCIL, BREWER, MAINE

Mr. KAELIN. Thank you. Members of the Committee, Mr. Young, I appreciate the opportunity to be here today with you to discuss the reauthorization of the MMPA.

I am Jeff Kaelin. I am the Executive Director of the Maine Sardine Council. I am also here today as Government Relations Coordinator for the Maine Aquaculture Association.

In addition to these responsibilities, I am also the President of the Associated Fisheries of Maine. All of the groups that I represent and work with want to be part of a long-term MMPA regime that ensures both the viability of marine mammal stocks and commercial fisheries in our region. There are very few significant interractions between Maine's commercial fisheries and Gulf of Maine marine mammal stocks.

The draft bill which you have asked me to comment on combines elements of the NMFS proposed regime and the primary negotiated proposal which I will call the critical stock regime. A recognition of the importance of the issues raised in the second negotiated proposal concerning "The Intentional Lethal Taking of Pinnipeds" is also reflected in the Committee's bill.

I will try to direct a few specific brief comments to portions of the draft bill and explain how those comments relate to the goals of the groups I have worked with over the last several months in this process.

The Committee's proposal states that its immediate goal is that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero.

This same goal is also established for regional conservation teams which would be authorized by the draft bill.

We asked the Committee to adopt the critical stock proposal's language calling for the reduction of takes to insignificant levels approaching a zero mortality and serious injury rate. There is a big difference between those two definitions. This may be a technical oversight. We hope that it is.

The Committee's draft bill would also establish a Scientific Working Group which would be required to develop preliminary stock abundance estimates which one would expect to be developed by the National Marine Fisheries Service utilizing information

gathered during the Interim Exemption Program. The negotiated regime that we have come up with would establish a Scientific Evaluation Working Group that would peer review decisions and assumptions related to stock assessments already made by NMFS. This approach seems more efficient and productive to us.

Also, the responsibilities of our proposed scientific working group correctly go beyond just the consideration of fisheries interactions to include investigating and monitoring environmental changes that may bear on stock status, including research on any predator/prey relationships, toxic pollutants and ecosystem issues.

We encourage you to broaden the scope of any scientific working group that may be established and use that body to review and comment on stock assessment and interaction decisions already made by the NMFS.

The Maine Sardine Council's primary motivation for becoming involved in the negotiations was to work toward the development of a regime that would not threaten to shut down our Category III herring fishery due to any impacts that New England's sink gillnet fleet might be having on the region's harbor porpoise population.

The NMFS' proposed regime and the Committee's proposal would make it possible for any fishery interacting with a marine mammal stock of concern—such as, possibly the harbor porpoise—to be shut down once a potential biological removal level of take was reached.

Also, like the NMFS proposal, according to the Committee's draft, herring fishery vessels would be required to register, pay fees to fish and display Marine Mammal Interactor decals—even if the fishery is known to have no significant impact on the marine mammal species involved. This approach is difficult to understand. We must oppose it as an unwarranted regulatory burden and cost without scientific justification.

We are pleased to see the Committee adopt the regional Conservation Team concept suggested in the negotiated regime.

While I do not directly represent the Maine Gillnetters Association, they are a member of the Associated Fisheries of Maine, and they did sign on to the negotiated critical stock regime. I think that they did so, primarily, because the Conservation Team concept represents a partnership between government and industry which is intended to develop strategies to both mitigate takes and allow for the continued viability of a fishery.

As envisioned by the negotiated agreement and your bill, this approach will develop cooperation and, ultimately, we believe will focus scarce resources where they can be expected to have the greatest impact.

With this negotiated proposal, because the use of permits and observers would be optional and used only where critical interactions are known to occur, our herring fishery, for example, would essentially maintain its existing Category III status.

Under the Interim Exemption Program, no MMPA regulation of our fishery was found to be necessary. There is no scientific evidence that supports any additional regulation for us in the future.

We are opposed to the requirement in the Committee's draft bill that the Secretary shall place observers in each fishery operating

under the general authorization to fish in order to verify incidental lethal takes.

The National Marine Fisheries Service has told us they spent some $24 million in the last three years to realize only six to ten percent observer coverage of Category I and Category II fishing vessels.

By requiring the Secretary to place some observers in each fishery, valuable resources will undoubtedly be drawn away from fisheries interactions which may be significantly impacting a marine mammal stock. By focusing on the remote likelihood of takes, the protection of critical stocks will be undermined.

During the winter months of the past two or three years, Maine's $50 million salmon net pen industry has experienced losses from seal predation that are estimated to be as high as $5 million each year, about a 10 percent annual loss. These economic losses from damaged, stressed and released fish are occurring even though all available predator control technologies are being employed. This situation represents a significant long-term impediment to the continued development of the marine finfish aquaculture industry in the Northeast, in our view.

We were involved in the negotiations on the Intentional Lethal Taking of Pinnipeds. Unfortunately, a regulated permitting system which allows for the continued intentional lethal taking of individual animals from robust seal populations, to protect gear and catch in our industry failed.

We are pleased to see that the Committee's draft bill recognizes this problem. The pinniped Interaction Task Force, that you would establish, however, does not give the specific authority to the Secretary of Commerce to actually issue permits to take animals. This proposal needs some work.

We ask the Committee to consider the idea of regional task forces for the Intentional Lethal Taking of Pinnepeds, just as you have done for the Conservation Team approach. We think the regional approach is going to be the most workable one.

I will leave it there, Mr. Studds. I see the red light is on. I do appreciate again the opportunity to be here with you. I look forward to continuing to work with you and the Committee over the next few weeks.

Mr. STUDDS. Thank you very much.

Ms. Young, I have been sitting contemplating your phrase,"charismatic pinnipeds". At first I thought it must be a rock group. But I said, no. Then the staff pointed out to me that probably what you really meant was charismatic pinnipedlets, the little ones. Because the big ones eat their children and beat their wives. That is not very charismatic.

It is a good thing Mr. Young was not here. God knows what would have happened to you with that reference. But it is fascinating. I have written it down.

[The statement of Mr. Kaelin can be found at the end of the hearing.]

Mr. STUDDS. Dr. Foster, for years your agency has been placed in the awkward position of trying to meet the mandates of this act with inadequate funding. Mr. Gilman pointed out that there have

been very few problems in enforcing it. It think that is because basically it has not been enforced, for the most part.

At our last hearing, we were informed that the cost of research, administration and enforcement of your original proposal would be some $19 million a year, but it appears you will only be appropriated some $10 million for the coming fiscal year.

The negotiated proposal attempts to deal with this issue, as I understand it, by instituting a management regime based on whatever funds happen to be appropriated. This causes a bit of apprehension.

I would like to hear your thoughts on the relationship between funding and management mandates.

Ms. FOSTER. Sir, I have been in public service for 20 years. I believe it is fair to say that I have never once in all that time worked under a piece of legislation where there were adequate funds to fully implement the law.

If we start developing legislation based on how much money we think we are going to have, then I believe very strongly that conservation and management progress in this country comes to an end.

First, you decide what it is you need to do and then you put enough flexibility into the law that allows you to rank things that need to be done.

For example, I agree with the comment earlier that this bill should not say that the Secretary must put observers on every fishery that falls into a category. I think the word should be "may," and then you target the fisheries where the serious problems are. I do not think we can afford to develop legislation based on how much money we have. We have never done that.

Mr. STUDDS. You obviously have not served in the Department of Defense.

Ms. FOSTER. Well, that is a different story.

Mr. STUDDS. I will give the other members a chance. We will go by the rule of appearance.

The gentlewoman from Oregon.

Ms. FURSE. No questions. Thank you.

Mr. STUDDS. The gentlewoman from Washington.

Mrs. UNSOELD. Thank you, Mr. Chairman.

Dr. Foster, last year your agency prepared a report at my request assessing the status of Washington State marine mammals. The report indicated that the current west coast population of California sea lions is about 180,000 animals in contrast to estimates of about 1,000 animals in the early 1930's.

The report also indicated that this population has been increasing at a rate of about 6.4 percent annually since 1971 and that recent studies, I am quoting, indicate that the present abundance "may be higher than any historic level".

For harbor seals, the Washington State population exceeds 30,000 animals with pup counts showing a 7 to 22 percent annual increase. Yet later in the report it indicates that the status of harbor seals relative to their Optimum Sustainable Population level has not yet been assessed.

My question is, what is the OSP for California sea lions and when will OSP be assessed for harbor seals?

Ms. FOSTER. You ask such simple questions. Perhaps you would like to answer, Dr. Hofman.

Dr. HOFMAN. Actually, I would not like to answer that question, but I will try.

The direct answer to the question is, under the Marine Mammal Protection Act, OSP determinations are to be made through formal rulemaking basically at the request of somebody seeking a waiver of the moratorium on taking.

It goes to the burden question that I think Dr. Foster raised in both, as I understand, her written testimony and certainly in her oral testimony.

Under the Act as presently written, if somebody wanted to take a marine mammal, the OSP determination would have to be made through a formal hearing. The way this has been done in the past, in the cases where I know that it has been done, is in front of an administrative law judge.

Determinations have been made and general permits have been issued to two fisheries, one is the Yellow Fin Tuna Purse Seine Fishery in the eastern tropical Pacific and the other was the Japanese Salmon Driftnet Fishery in the North Pacific.

Mrs. UNSOELD. I am going to interrupt you because my time is going to run out.

What you are addressing is when there is a crisis stage and somebody comes and asks you. But I want us to start looking at a larger picture.

In the Chairman's draft there is established a task force to determine the impact of marine mammals on the salmonids. But what about the impact of marine mammals on the rest of the ecosystem? For example, do we have any information on the relationship between healthy and expanding marine mammal populations on those that are declining?

At some point we have to get ahead of the problems. I am not quite sure, we may already not be ahead, but that is what I would like to have you address, Dr. Foster.

Ms. FOSTER. First, we were really pleased to see this addition in this bill, to set up the pinniped task force. Because I think that we can lump all these concerns together and we can say we really do need to take a look at the pinniped situation because it is not simple. We are not going to fix that situation by simply looking at, for example, pinnipeds and salmon in isolation. As you say, we have to look at the system. We have to look at all aspects of it.

So, we think that we could also address the OSP question with regard to California sea lions.

Mrs. UNSOELD. It seems to me that I would certainly never want to suggest that the population of seals and sea lions is the reason for the decline in salmon population. However, it certainly, in my view, complicates the recovery.

So you have two protected species interacting, and we have to start looking at the bigger picture.

I would submit that you all should—maybe we are going to have to rig this, but you all voluntarily should come up with an OSP. And that not forthcoming, we will try to mandate it. But it would be better if you voluntarily undertook it.

Dr. HOFMAN. Yes. May I add several points?

Looking at this issue, the increases in both seal populations and sea lion populations can be attributable basically to one of two things. Either the populations had been reduced to such very low levels that they still have not recovered after more than 20 years of protection or, for some reason, there has been a release from something that was limiting the population historically and which has allowed the population to go beyond what its historic carrying capacity was.

This is a very basic question and one I think was attempted to be resolved in part by the definition of current carrying capacity in this draft bill. The way I read the definitions, it would allow you to look at increases in carrying capacity as well as decreases in making the threshold OSP determination.

Second, I agree completely with the point that we need to look at the broad range of issues. And the basic issue is the status of the salmonoid resources that are at risk right now. What are the causes of the declines and how do we manage all of the things that affect the resource in a way that we can rebuild it?

Maybe the way to begin is by looking at the broad range of fisheries issues and the marine mammal issues within that context.

Mrs. UNSOELD. But the impact is on more than just salmon.

Mr. STUDDS. The gentleman from California.

Mr. HAMBURG. Thank you, Mr. Chairman.

Just picking up on the gentlewoman from Washington's last statement with respect to other species other than salmonoids that are being affected. In my district in Northern California the major concern seems to be the sea urchins and how they are affected by the allowance for sea otters to migrate northward.

I believe it is from San Nicolas Island where the population has been brought back significantly and nurtured. And yet a plan from the National Marine Fisheries Service—or is it Fish and Wildlife—to allow the marine mammals to migrate northward to what was perhaps their traditional grounds has caused severe concern in the sea urchin industry in my district.

I would like to hear if any of you have a comment on that. If not, perhaps I will submit some questions, and you can answer them for the record.

[Mr. Hamburg's questions can be found at the end of the hearing.]

Dr. HOFMAN. It is a Fish and Wildlife Service species, not a National Marine Fisheries Service species, as Dr. Foster is happy to note. There is a Southern California Sea Otter Recovery Plan.

I think what you are talking about is, the Fish and Wildlife Service more than a year ago revised and updated the plan in ways that were very confusing. The Commission recommended that that plan be revised, and be made available again for public comment. I think that is what is happening. It might be useful to put that question specifically to the Fish and Wildlife Service.

Mr. HAMBURG. I will do that. When things like that happen, it causes tremendous paranoia to take hold in my district. The people start to say things like, well, the only reason they are doing this is to allow offshore oil drilling to occur and they will wipe out the sea urchin fishery which is our most profitable fishery now. The reason

it is the most profitable fishery now is because the salmon fishery industry is so beleaguered.

This gets me to the second issue I would like to raise. I would like to raise the concern about the sea lions and seals taking—particularly at the mouth of the Klamath River, and that has to do, I believe in part, with the successive years of drought in California, the river levels being exceptionally low.

As we try to figure out what all the causes are for the loss of salmon populations, this issue continues to come up. I am not only talking about the direct take at the mouth of the river but also marine mammals getting into the fishing equipment, actually robbing lines and so on.

I would like to know if you have any comments on that issue with respect to—particularly with respect to northern California.

Ms. FOSTER. Again, that is what I was saying earlier. I think that the pinniped question—I agree it is much broader than just the pinnipeds and the salmon. I think that, through this kind of a task force that the bill talks about, that we would discuss the problem in a much broader sense.

I think I would go a little further with the bill and perhaps say what the Secretary is expected to do after this interagency task force comes up with some suggestions.

But it is a broader question, and I think it applies to the situation you are talking about.

Mr. HAMBURG. One of the questions raised to me by the fishermen is why can't some of these animals be gently relocated to somewhere where they don't have such access to the salmon. Other people say they are just coming back to their natural grounds, and they have as much right to be on the rocks taking food as the fishermen do. But it does cause a lot of consternation in my district.

Ms. FOSTER. In the Washington situation, our northwest center and regional folks spent a lot of time trying to relocate the pinnipeds. Our regional director is fond of saying that as the pinniped swam off, he barked at the regional director, saying, see you in three weeks, and he did.

Mr. HAMBURG. Mr. Chairman, do I need unanimous consent to submit some questions for the record on these issues?

Mr. STUDDS. Now you have it.

[The information can be found at the end of the hearing.]

Mr. STUDDS. The gentleman from New York, the Chairman of the Fisheries Management Subcommittee.

Mr. MANTON. Thank you, Mr. Chairman.

My understanding is that the existing scheme of things only resulted in about 1 percent of existing vessels registering and keeping logs, et cetera. Should we look to another system? This, obviously, has not worked very well.

Ms. FOSTER. We have an existing registration system we put in place during the exemption. We have about a quarter of the vessels registered that we would have to register. The estimate is, I think, that there is between 50,000 and 80,000 vessels out there and that we have in our data base already about 16,000. So we have a system to build on.

I would like to point out that my staff would be pleased to get together with the Subcommittee staff to go over what indeed our

data management system has brought about during the past 5 years. I would disagree that it has accomplished very little because I think you would be amazed at what we have been able to do with this data system.

Mr. MANTON. I am taking my numbers from our staff memorandum. NMFS estimates that in some parts of the country registration and compliance is less than 1 percent. You are saying overall it is about 16 percent?

Ms. FOSTER. No.

Herb, do you have percentages? We don't know what the exact universe of vessels is, but we get estimates from 10 to 30 percent.

Mr. MANTON. Could you submit that for the Committee's perusal what the up-to-date figures are on compliance?

Ms. FOSTER. Yes.

[The information can be found at the end of the hearing.]

Mr. MANTON. The other issue is the requirement of placing observers on ships. You pointed out earlier that you could not mandate complete coverage, that you wanted to have some flexibility in the observer program. I agree with that.

It seems to me that, right now, the actual observer status is on 1 to 10 percent of the vessels, according, again, to our memorandum.

Some groups have suggested that perhaps fishermen should pay for observers, rather than taxpayers. What do you think about that?

Ms. FOSTER. Well, yes, that is an interesting question. There are some instances in some of our fisheries where the fishermen do contribute at least some portion of cost of observers. And that is a possibility, especially if—what we had proposed, I think, is that the fishermen might be asked to contribute a portion of the observer coverage only if carrying an observer was a condition of their being able to continue to fish, not in the general sense. We did not ask that the fishing community pay for observer coverage in general.

Mr. MANTON. So it would be vessel-specific?

Ms. FOSTER. Fishery-specific.

Mr. MANTON. Thank you.

Mr. STUDDS. Does any member want a second round?

The gentlewoman from Washington.

Mrs. UNSOELD. I would add that the seals and sea lions are impacting our shellfish industry because their shear population numbers are causing pollution that is requiring commercial shellfish beds to be closed down or else those shellfish move to another environment for the required length of time before they can be harvested.

I have one other question. The recommendations would authorize all citizens to use non-lethal measures to deter marine mammals to protect public or private property, including marinas and docks. But the statement that the use of non-lethal measures by recreational fishers deter marine mammals interracting with sports fisheries is unclear. Do any of you want to comment on your views on that?

Mr. GILMAN. I think we overlooked that in our compromise proposal.

The way the discussion played out, I don't recall any specific discussion on whether recreational fishermen should be given the au-

thority to use potential non-lethal means. We had a lot of discussion of that with the commercial fishing industry.

One of the suggestions on the table was to give up the right to intentionally shoot animals. The thought was, if you can't shoot them you have to have some method to keep them away from your nets or gear. You have to harass them away. Under the existing law, harassment could be prohibited as well.

So I don't know that I speak for the group on this, but, from my own personal perspective—and I don't represent recreational fishermen—but it seems like they are citizens of the public as well, and they should be given the ability to non-lethally deter animals so the frustration level in the industry as a whole is reduced. There is a lot of frustration, as you well know, on the west coast right now.

Mrs. Unsoeld, I would like to address the other side of the story on OSP. Guy Thornburg is not here. He is not a witness. But I am speaking on his behalf and on behalf of his group in this regard. We don't believe this government can make OSP determinations. We don't believe they have the political will to make OSP determinations quickly and efficiently.

One question that we would like to see answered for the record is how many years of continuing data and further investigation is it going to take the Federal Government and National Marine Fisheries Service to make OSP determinations on California sea lions and Pacific harbor seals?

We believe that they will respond under their existing model that they need 5, 10, you know 15 more years of data before they can do anything. In that event, we are in real trouble out there.

The act will provide the States with authority to manage marine mammals in an active way only if you have an OSP determination. We think you need to assign a number. That is our personal view.

Mrs. UNSOELD. Dr. Foster, would you like to jump on that one?

Ms. FOSTER. Yes. You may wait a long time for the government to do OSP determinations. But I would argue that it is because we don't have the information, not because we don't have the political will today, anyway.

Mr. GILMAN. Fair enough. I will concede that.

Ms. FOSTER. The only thing that I can say to you would be what I am getting from my scientists, and that is that it will take from five to 10 years for some species to have enough information to do OSP. That is why in our proposal we came up with a plan that would get around OSP in a sense.

Mr. GILMAN. Not with respect to the management of marine mammals. If we want to push the point we have to have a $1 million war chest to do it. We are going to have to hire biologists and a team of lawyers.

Mrs. UNSOELD. I will reclaim my time here, Mr. Gilman, to also reiterate that at some point the government is going to have to make the decision on the best available data and recognize that there be later refinements. I would submit that a 5- to 10-year period is not going to satisfy me.

Thank you, Mr. Chairman.

Mr. HOFMAN. I would like to comment.

Mr. STUDDS. Very briefly, if you would, sir.

Mr. HOFMAN. The first point is, as I noted earlier, under the act as presently written—at least as I understand it—the requirement is not on the government to make that determination. The requirement is on whoever wants to do it.

Mrs. UNSOELD. But, hopefully, Mr. Hofman, this administration is going to go beyond what is just the letter of the law and do what is good for the ecosystem and the environment and the industries.

Mr. HOFMAN. There is a second point that is important to pick up in this context and that is where OSP determinations have been made in the past they have been based on the available data. This issue of whether or not we need five to 10 years of additional data is not relevant.

Mrs. UNSOELD. You didn't listen to me. I said that——

Mr. STUDDS. I understand we have concluded that we are brave but dumb.

I want to thank you all. We have a lot of work to do. There are meetings scheduled throughout this month. It is our hope to have this problem resolved as soon as possible, but by all means prior to the 30th of September.

The Subcommittee stands adjourned.

[Whereupon, at 11:35 a.m., the Subcommittee was adjourned, and the following was submitted for the record:]

STATEMENT OF
NANCY FOSTER
ACTING ASSISTANT ADMINISTRATOR FOR FISHERIES
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
U.S. DEPARTMENT OF COMMERCE

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES

AUGUST 4, 1993

Mr. Chairman and Members of the Subcommittee:

I am Nancy Foster, Acting Assistant Administrator for Fisheries. I appreciate the opportunity to testify at today's hearing concerning the Marine Mammal Protection Act (MMPA).

The 1988 amendments to the MMPA included section 114, which provided an interim exemption to the MMPA moratorium on taking marine mammals. This interim exemption allowed commercial fishing operations to continue while the National Marine Fisheries Service (NMFS) collected information necessary to determine the impact of mortality incidental to commercial fishing on marine mammal populations. In many cases, that mortality was not a major factor limiting marine mammal populations. In some cases, however, incidental mortality was large.

In December 1992, NMFS submitted its proposed regime to govern interactions between marine mammals and commercial fishing. The NMFS regime was based on guidelines submitted to NMFS by the Marine Mammal Commission, which prepared its guidelines in

accordance with Congressional direction included in section 114. In June 1993, representatives of several environmental groups and fishing organizations negotiated an alternative proposal for governing marine mammal/fishery interactions. The reauthorization legislation introduced by Members of the Merchant Marine and Fisheries Committee drew from both of the proposals submitted earlier.

The bill, like the negotiated proposal, shifts the burden of proof from individuals who want to use the marine environment to NMFS for the protection of marine mammals. The MMPA originally prohibited the taking of marine mammals unless the individual or group desiring the taking could justify the need for the taking and that the removal of marine mammals would cause no more than a negligible impact to population stocks of marine mammals. The bill would grant a general authorization to take marine mammals unless the Secretary should demonstrate that such a taking would be detrimental to populations of marine mammals. In the view of NMFS, this important philosophical distinction goes to the very heart of the MMPA. Moreover, the bill treats commercial fishing differently than other members of the public, like public display and scientific research user groups, who must still prove individually that their activities will not be harmful to marine mammals before they are authorized to take marine mammals, even though those activities remove fewer marine mammals than commercial fishing. Incidental taking of marine mammals in

activities other than commercial fishing requires a cumbersome regulatory process established under section 101(a)(5), which is even more difficult than that for scientific research or public display permits.

The issue before the Congress is whether or not the MMPA will give up, forever, a major element in the precautionary principle for the protection of marine mammals. Placing the burden on those entities that wish to take marine mammals provides a significantly added measure of protection for marine mammal stocks when data are limited.

NMFS has additional concerns or is unclear regarding specific portions of the legislation. Below, I present these concerns, which appear in order of their appearance in the bill. The Administration is reviewing H.R. 2760, the "Marine Mammal Protection Act Amendments of 1993," which was just introduced. We will provide any additional comments in writing for the Committee's consideration. For example, the establishment of new advisory bodies must be evaluated in relation to the Administration's goal of reducing the overall number of such bodies.

SMALL TAKE PROVISIONS

The legislation would amend section 101(a)(4) of the MMPA to authorize the taking of endangered marine mammals incidental to

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commercial fishing operations. The amendment is necessary because the current wording of that section applies only to stocks of marine mammals that are not depleted.

NMFS agrees that marine mammals listed under the Endangered Species Act (ESA) should be protected under the MMPA as well. However, the ESA requires that incidental taking of marine mammals be authorized by section 101(a)(5), rather than 101(a)(4), of the MMPA; therefore, amendment to 101(a)(5) or to section 7 of the ESA will be necessary to authorize incidental taking of endangered marine mammals in fishing operations.

The bill is clear in that section 101(a)(4) rather than the new section 118, added by the bill, should be used for authorizing incidental taking of endangered marine mammals. However, many of the features of section 118, such as observer requirements, vessel registration, reporting of lethal takes, conservation plans, and the ability to promulgate emergency regulations to halt actions when takes may exceed the specified limits, would provide safeguards to endangered marine mammals. It is not clear why the bill would not apply these elements of the new section 118 to endangered marine mammals.

SECTION 118: ZERO MORTALITY RATE GOAL

Like the negotiated proposal and the regime submitted by NMFS, this legislation supports the Zero Mortality Rate Goal by stating

"...it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero." NMFS feels that limiting fishing effort would be necessary only to bring removals below Potential Biological Removal (PBR). Further reduction in the mortality rate could come as a result of research into fishing technology, techniques, and practices rather than a specified rate of progress in approaching zero mortality rate. The fruits of this research would likely be represented by a step function, in which a major decline in mortality rate would be followed by a protracted period in which the mortality rate is level. Furthermore, rates of incidental mortality and serious injury are very low in many fisheries. Detecting a statistically significant reduction in this rate would be difficult, if not impossible.

TAKING OF MARINE MAMMALS INCIDENTAL TO COMMERCIAL FISHING OPERATIONS

The bill states that this section "shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid ..." permits issued under 204(b) of the Magnuson Act. The statement should be clarified by replacing the word "and" with "or." Otherwise, it is possible to interpret the passage as applying only to those persons who operate vessels that pass both tests (U.S. registry and Magnuson permits).

The bill specifically exempts California sea otters from the protective measures described in section 118, relying instead on the ESA and Public Law 99-625 concerning additional sea otter protection. It is not clear if California sea otters would be protected by the MMPA should the population recover sufficiently that they could be removed from threatened status under the ESA.

SCIENTIFIC WORKING GROUP

No authorization is given to the Secretary to pay for expenses to members of the Scientific Working Group, Conservation Teams, or the Pinniped Interaction Team. The bill should state that the Secretary may, but is not required to, pay the travel costs of some members of these groups to ensure participation by scientists with the necessary expertise.

STOCK ASSESSMENTS

All time periods listed in the legislation would be difficult to meet. For example, members of the Scientific Working Group would be volunteers for this effort. To request that these individuals review more than 60 stock assessment reports and produce a coordinated set of insightful comments within 60 days would be virtually impossible. These scientists have other responsibilities and cannot devote full-time effort to this review. Based upon our experience with peer review groups, the period for their review should be doubled at a minimum.

If the Scientific Working Group were to submit individual comments for the Secretary to use in revision of stock assessments, rather than a coordinated set of comments, then 45 days is insufficient for incorporating their comments into revisions. I recommend that the bill establish a coordinated review from the Scientific Working Group. Even then, however, if the comments of the Group would require extensive re-analysis of data by the Secretary, 45 days would be insufficient to complete such analysis and publish final stock assessments.

The bill requires stock assessments to include the approximate number of vessels participating in each fishery that interacts with each marine mammal stock. Yet the bill requires registration only for vessels within fisheries that interact with endangered, threatened, depleted, or critical stocks. The number of vessels, therefore, can be updated only for those fisheries that interact with such stocks. Interactions and sizes of fisheries are dynamic, and subsequent stock assessments will not be accurate without registration in all interacting fisheries.

AUTHORIZATION TO TAKE MARINE MAMMALS

This subsection requires that vessels in all fisheries that interact with marine mammal stocks listed as threatened or endangered under the ESA or depleted or critical under the MMPA register biennially. Mandatory registration is a major part of the NMFS proposed regime, and NMFS supports such a registration.

However, the number of fisheries that would have to register under the bill is insufficient to allow NMFS to fulfill all requirements of the bill. For example, stock assessment reports require the estimated number of vessels and levels of interactions in all fisheries that interact with all marine mammal stocks. Registration requirements under the Interim Exemption resulted in good estimates of the numbers of vessels in Category I and II fisheries, but we have no data indicating number of vessels or levels of interaction in Category III fisheries. The bill contains no mechanism to address this problem.

We assume that lethal takes discussed in the proposed subsection 118(d)(1)(C) is intended to include seriously injured marine mammals that would likely die as a result of these injuries. Such an inclusion appears consistent with Congressional intent as expressed in stating the Zero Mortality Rate Goal in section 114. NMFS also assumes that lethal takes in all fisheries must be reported to the Secretary.

Proposed subsection 118(d)(1)(D) would require each vessel to comply with monitoring requirements established under subsection (f), which authorizes the Secretary to place observers in any fishery that interacts with marine mammals. Without a registration process for all interacting fisheries, observer assignments cannot be made in all cases in which they are

authorized. Our experience under the Interim Exemption shows that adequate verification of lethal takes requires a registration process that includes all fisheries. A data base similar to that resulting from proposed subsection 118(d)(1)(A) is necessary to get vital information for fisheries interacting with non-critical or unlisted stocks of marine mammals.

Proposed subsection 118(d)(2) authorizes the Secretary to charge a fee for the granting of an authorization under this section. It is not clear if the fee applies only to vessels in fisheries for which registration is required, or whether it would apply to all vessels operating under the general authorization. Further, the fee should be based on the administrative costs of establishing and maintaining necessary data bases and other administrative costs necessary for granting the authorization, rather than being based solely on the administrative costs incurred in granting an authorization.

Proposed section 118(d)(3) states, "If the Secretary finds that the incidental taking of marine mammals in a fishery is likely to exceed the potential biological removal level, the Secretary shall immediately consult with the appropriate conservation team established under subsection (e), regional councils, and the States, and prescribe emergency regulations to prevent to the maximum extent practicable any further taking." The phrase, "incidental taking of marine mammals in a fishery," should be

replaced by "human-related mortality from all causes." PBR includes losses from all sources, and limiting consideration to removals from a single fishery would result in problems. For example, the population of harbor seals in the Gulf of Alaska is declining, and human-related mortality likely exceeds the PBR level. However, removals from any single source, especially any single fishery, may not exceed PBR.

Proposed subsection 118(d)(3)(C) should be changed by removing "or the end of the year for which the annual potential biological removal was calculated, whichever is earlier." This is because problem areas will not likely be solved until a conservation plan and associated regulations are promulgated. However, there should be an opportunity for public involvement, such as a hearing, in the Secretary's determination as to whether or not the reasons for the emergency continues to exist.

CONSERVATION TEAMS

Conservation Teams, as advisory groups, have some merit. The Conservation Teams would allow interested parties more flexibility in providing input to the management of critical stocks than they have under current laws. Such flexibility may provide these parties a greater opportunity to become a part of the solution to difficult management problems, thus facilitating the implementation of management actions and improving compliance.

Proposed subsections 118(e)(5)(C) and 118(e)(6)(C) would require the Secretary, if Conservation Teams are unable to submit draft plans within 6 months where takes exceed PBR or 11 months where takes do not exceed PBR, to publish a proposed plan and implementing regulations. Because the Secretary would not be responsible for drafting a plan until the deadline passed, these provisions should be changed to allow the Secretary to publish the necessary plan and regulations as soon as practicable following the deadline.

Proposed subsections 118(e)(5)(E) and 118(e)(6)(E) would require that Conservation Teams meet semi-annually or annually to update Conservation Plans and review progress in their implementation. NMFS feels that such regular meetings may not be necessary. Once the plans are developed, reviews and updates could be accomplished through communication among group members, then making proposed revisions subject to public notice and comment. The latter approach may be much less costly than requiring annual meetings. However, convening these meetings should be an option.

The proposal to establish regionally-based Conservation Teams may raise questions of responsibility for stocks whose distribution crosses regional boundaries. The team from the region where most incidental mortality occurs should take the lead in preparing conservation plans in consultation with teams from other affected regions.

MONITORING INCIDENTAL LETHAL TAKES

NMFS assumes that the Secretary may require observer coverage in all fisheries subject to U.S. jurisdiction, not just those fisheries required to register. The text of sections 114(e)(6) and 114(e)(7) should be repeated in the new section 118 to avoid interpretation problems when section 114 expires after the general authorization is issued.

The proposed subsection 118(f)(2) reads, "The Secretary shall require that vessels operating...." The wording should be changed to read "The Secretary may require that vessels operating ...." Observer coverage should be within the Secretary's discretion.

NMFS recognizes the need to place observers on vessels in fisheries where rates of interaction between marine mammals and fishing operations are not well documented. Therefore, NMFS needs the authority to place observers on vessels in fisheries where takes may be occurring, but the levels of take are unknown.

Given that the Secretary is guided by requirements in the bill to obtain statistically reliable information according to several standards, subsection 118(f)(3) is not necessary. However, if some priority for observer coverage must be specified, it should be a function of the precision required for statistically

reliable estimates rather than apparently arbitrary percentage values.

NMFS feels that subsections 118(f)(4) and (5) should be deleted. Allowing vessel owners to choose among supplemental observer providers could encourage these providers to market services and products that may not be in the best interest of living marine resources, particularly marine mammals. As a result, data may not be accurate or reliable. The Secretary should be given sole discretion to assign appropriate observer providers to vessel owners, based on the qualifications of the provider and the requirements of the monitoring program specified under this section.

There should be a provision for the Secretary to charge a fee apart from the authorization fee to owners of fishing vessels to help defray the costs of the observer program. Fees should be chargeable whether the observers are Federal employees or from supplemental observer providers. However, supplemental observer providers may be profitable enterprises, and the cost of a supplemental provider program may be higher than one administered solely by the Federal government.

PENALTIES AND ENFORCEMENT

NMFS is considering the advisability of a provision in the MMPA that people or vessels lose all Federal fishing rights and

privileges for violations of the MMPA, when deemed appropriate by the Secretary. The wording of subsection 118(g) may unduly restrict the Secretary's discretion and ability to establish violations. The subsection requires that provisions of the MMPA be knowingly violated, which will be difficult, if not impossible, to substantiate. Therefore, the word "knowingly" should be deleted, and the word "shall" should be changed to "may." Additionally, in order to clarify when the Secretary may seek withdrawal of Federal fishing permits under the bill, subsections 118(g)(1) and (2) should be revised. These subsections should state that action by the Secretary may be taken only after a conviction has been obtained for an appropriate MMPA violation. Subsections (1) and (2) should also specify that the Secretary can only withdraw Federal fishing rights and privileges.

Further, the Secretary would not have authority to withdraw state-granted fishing rights. To address these fisheries, NMFS recommends including a provision for withdrawing rights or privileges to operate under the general authorization established by this bill so that, even if fishermen could continue to operate in state fisheries, they would not be authorized to take marine mammals.

The effect of the penalties, as proposed, could, in many cases, be meaningless. For example, in a fishery that operates from

June to September, a 30-day, or even 6-month withdrawal of fishing privileges beginning October 1 would have no effect. The Secretary should have the discretion to decide when the penalty would be imposed. NMFS understands that withdrawing all fishing rights and privileges of a person or vessel means these rights and privileges in all Federal fisheries in which the vessel operates, not just the fishery in which the violation occurred.

ESTABLISHMENT OF PINNIPED INTERACTION TASK FORCE

It is not clear why duties of the task forced are limited only to advising on management practices regarding salmonid fishery resources. Its mandate should be extended to all fishery resources by deleting "salmonid" from proposed subsection 104(i)(1).

The range of advice specified in 104(i)(A) through (C) should be extended to address other factors affecting marine or riverine ecosystems that adversely affect fishery resources. This would allow the Secretary to analyze the role of pinniped predation in the context of the entire ecosystem rather than as an isolated factor. The advice should also include an evaluation of the short-term and long-term benefits of management actions.

The purpose of this task force would be to provide advice to the Secretary regarding pinniped interactions with fishery resources.

However, the bill does not indicate what, if anything, the Secretary is supposed to do with this advice.

DEFINITIONS

Current carrying capacity. The numbers of marine mammals supported by habitats prior to human-caused degradation or enhancement may not be known in all cases. We know pre-exploitation numbers for very few stocks of marine mammals. NMFS employs a technique called "back calculation" to estimate these numbers when certain assumptions can be satisfied and the history of removals are known; however, a "back-calculated" estimate is a number based upon current population dynamics. Population models are projected backward in time to estimate the historical number of animals in a population based on current habitat resources. For most stocks, requisite information is not available, and this back calculation cannot be performed. In these instances, we must detect density-dependent mechanisms in operation by using a method such as the dynamic response analysis to assess the population's status with respect to OSP. Neither of these techniques is a true measure of historical numbers; therefore, the definition of "current carrying capacity" proposed in the bill needs to be revised.

CONCLUSIONS

The bill we reviewed has drawn from both the NMFS and negotiated proposals, and many of the provisions described in the bill are

sound. However, NMFS has concerns with specific portions of the bill, many of which could be addressed easily. In this testimony, I have described several of these concerns, but have not presented a detailed review. We would be pleased to supply further thoughts in writing and to work with the Committee to resolve these concerns.

Thank you for the opportunity to provide these comments. I would be happy to answer your questions.

STATEMENT OF
ROBERT J. HOFMAN, PH.D.,
SCIENTIFIC PROGRAM DIRECTOR
MARINE MAMMAL COMMISSION

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES

AUGUST 4, 1993

Mr. Chairman and Members of the Committee:

I am Robert Hofman, Scientific Program Director of the Marine Mammal Commission. I am pleased to provide the Commission's views on the Bill, introduced by members of the Merchant Marine and Fisheries Committee, to establish a new regime to govern the incidental take of marine mammals during commercial fishing operations.

The Bill incorporates many provisions of the regime proposed by the National Marine Fisheries Service in December 1992 to govern the incidental taking of Marine Mammals in the course of commercial fishing operations after September 30th when the interim regime established by the 1988 Marine Mammal Protection Act Amendments is scheduled to expire. It also incorporates provisions of the alternative regimes proposed by the fishing industry and certain environmental groups and by the Marine Mammal Protection Coalition. It represents a compromise which, in most respects, seems both reasonable and workable, at least in the short-term.

As the Commission understands it, the Bill would authorize fishermen to lethally take unlimited numbers of marine mammals, except those listed as endangered under the Endangered Species Act, until such time as the National Marine Fisheries Service:

1. develops preliminary assessments of (a) the status of all marine mammal stocks that occur in waters under U.S. jurisdiction, (b) the levels of taking that could be allowed without causing the stocks to be reduced or maintained for significant periods of time below their maximum net productivity levels (the lower limit of the optimum sustainable population range), and (c) those stocks that are being reduced or maintained below their maximum net productivity levels as a result of incidental taking and therefore should be designated "critical" stocks;

2. constitutes an independent Scientific Working Group to provide expert peer review of the preliminary assessments;

3. revises the preliminary assessments to take account of the comments and recommendations provided by the Scientific Working Group, and makes the revised assessments available for public review and comment; and

4. finalizes the assessments and promulgates regulations, as necessary, to ensure that incidental lethal taking does not exceed the Potential Biological Removal levels calculated for the various stocks.

The Bill specifies the criteria to be used to estimate the Potential Biological Removal level for stocks that are depleted, and for stocks of unknown or uncertain status, when the minimum population size and the maximum potential growth rate are known or can be estimated with reasonable certainty. The criteria are appropriately conservative and, if adopted, will provide reasonable certainty that taking, kept at or below the estimated Potential Biological Removal level, will not cause the affected stocks to be reduced or to be maintained below their maximum net productivity level. However, the Bill does not specify the criteria to be used to calculate the Potential Biological Removal level for stocks determined to be within their optimum sustainable population range. Likewise, it does not specify the procedure to be used to determine whether a stock is within its Optimum Sustainable Population range.

At present, status of stocks determinations must be made through formal rulemaking. Further, authorized take levels from stocks determined to be within their optimum sustainable population range may be equal to, and in some cases greater than, the net annual increment or replacement yield. This take level would be much higher than could be authorized, using the conservative criteria for establishing the Potential Biological Removal level for stocks of unknown or uncertain status. Thus, continuation of the present system for making status of stocks determinations and determining levels of take that can be authorized from stocks within their optimum sustainable range would provide an incentive for obtaining the information necessary to determine whether a stock of unknown or uncertain status is within its optimum sustainable population range. Consequently, the Commission believes it would be desirable to specify that the Potential Biological Removal level from stocks determined to be within their optimum sustainable population range is the level that can be sustained without causing the stock to be reduced below its maximum net productivity level. On a related point, the Commission believes it would be desirable and appropriate to specify that stocks will be assumed to be below their maximum net productivity level, and the Potential Biological Removal level calculated accordingly, until a formal determination is made that the stock is within its optimum sustainable population range.

In this same context, it is important to recognize that the Marine Mammal Protection Act's goal of rebuilding and maintaining marine mammal populations at optimum sustainable levels cannot be achieved unless taking from all sources is kept at or below the Potential Biological Removal level. It also is important to keep in mind that many animals which are seriously injured may subsequently die, even though they were released alive. These points are not clearly and consistently reflected in the Bill as presently drafted. Lines 14-18 on page 10 of the Bill state, for example, that: "[i]ncidental lethal takes for each marine mammal stock shall not exceed the Potential Biological Removal level established in the final stock assessment required under subsection (c)." This can be interpreted to mean that serious injury and non-fisheries related sources of mortality need not be considered when determining the level of incidental fisheries take that can be authorized. Although there is no mention of serious injury, line 24 on page 13 and line 7 on page 15 refer, in a similar context, to "total lethal takes" and can be interpreted to mean that the intent is to ensure that the combined take from all sources does not exceed the estimated Potential Biological Removal level.

It also is not clear from the Bill, as presently drafted, who would be responsible for allocating take among fisheries and other users when the total take, if not limited, would be greater than the Potential Biological Removal level. Likewise, it is not clear what procedures and criteria would be used to decide, when necessary, how the allowable take should be allocated. One possibility would be to make the Regional Conservation Teams responsible for identifying, and recommending to the Secretary how the total allowable take should be allocated among, the various users when the total take otherwise would be greater than the Potential Biological Removal level. To ensure consistency with the provisions of the Act exempting taking by Alaska Natives for subsistence purposes from certain of its prohibitions on taking, it should be made clear that highest priority is to be afforded to taking for subsistence purposes by Alaska Natives and that no incidental taking in the course of commercial fishing operations will be allowed if it would have an unmitigatable adverse impact on the availability of the affected species or stock for taking by Alaska Natives for subsistence purposes.

The Bill would establish eight regional conservation teams. The principal function of these teams, as the Commission understands it, would be to develop plans for identifying and encouraging changes in fishing gear and practices which will reduce incidental taking to levels approaching zero. The regional approach makes sense in that a number of the affected marine mammal stocks are taken incidentally in more than one fishery and the fisheries generally are managed on a regional basis. However, it is not clear how the regional teams will deal with situations where the affected stocks migrate between, or

have ranges which include, two or more regions. Also, it is not clear whether the regional teams will be responsible for considering and providing advice on activities, other than commercial fisheries (e.g., coastal development, offshore oil and gas development, Native subsistence hunting, etc.), that may be affecting or posing threats to marine mammals and their habitat in the region.

From a practical perspective, it might be more efficient to differentiate between and use separate mechanisms to (1) identify and ensure that taking from all sources is below the Potential Biological Removal level; and (2) identify ways to reduce mortality and serious injury incidental to commercial fishing operations to as near zero as practicable, and how the allowable take can be allocated equitably among the various user groups when necessary to ensure that the total take does not exceed the Potential Biological Removal level. This could be done by (a) constituting groups of relevant experts, on a stock-by-stock basis, to do status reviews and prepare recommended conservation plans for critical stocks, taking into account only biological-ecological considerations, as presently provided for by Section 115 of the Act; and (b) constituting regional groups, as proposed in the Bill, to (i) identify and provide advice on actions that might usefully be taken, on a fishery-by-fishery basis, to reduce the incidental take of marine mammals to insignificant levels approaching zero, and (ii) when the total take from all sources is likely to exceed the estimated Potential Biological Removal level, provide advice to the Secretary on how the allowable take should be allocated to the various users to be most equitable.

The Bill would require fishermen to report all lethal incidental taking of marine mammals following completion of the fishing trip during which the take occurred. It would require that the National Marine Fisheries Service establish a monitoring program to verify the accuracy of the reports and to detect changes in the affected marine mammal stocks, with particular emphasis on stocks determined to be critical. It would authorize the Service to place observers on a representative sub-set of fishing vessels to obtain statistically reliable information, and would specify priorities for placing observers based primarily upon the status of the affected marine mammal stocks.

The Bill would require biennial registration of all vessels engaged in fisheries that have been identified, through information gathered in the course of the interim exemption program, to take endangered, threatened or depleted species or species identified as critical under the new regime. There appears to be no requirement and no means provided in the Bill to monitor the numbers of vessels engaged in fisheries that are not now known to take from such species or stocks, or to obtain effort, location, and other data from vessels engaged in such fisheries. Also, there appears to be no explicit requirement to

monitor the size or vital rates of any of the potentially affected marine mammal stocks. Consequently, it is questionable whether the Bill, as presently drafted, would provide an adequate means for ensuring, in the long term, that incidental take in commercial fisheries, by itself and in combination with other human-activities, does not cause any marine mammal species or population stock to be reduced below its optimum sustainable population level.

The simplest and most efficient way to remedy this shortcoming would be to (1) specify in the Bill that the Secretary must maintain, and periodically (annually or biennially) up-date, a list of those fisheries taking marine mammals, frequently and occasionally, and the number of vessels or persons involved in each such fishery; and (2) provide the Secretary authority to require (a) registration of all vessels that engage in fisheries that have more than a remote possibility of taking marine mammals, and (b) that owners of such vessels maintain and provide records of fishing effort and other information necessary to extrapolate marine mammal catch data collected by observers to an accurate estimate of total catch by fishery.

On a related matter, the Commission thinks it would be ill-advised to try to specify observer coverage, based upon the status of the affected stocks, as presently is done in Section 118(f)(3) of the Bill ("Monitoring Incidental Lethal Takes"). In some cases, it may be possible to get sufficient data to accurately estimate the total level of incidental take in a particular fishery by placing observers on substantially fewer than 20 percent of the vessels engaged in the fishery. In other cases, as much as 100 percent observer coverage may be necessary. Funding may be limited and specifying observer coverage could interfere with, rather than enhance, the National Marine Fisheries Service's ability to use available funding to best advantage.

The Commission also is uncertain about the purpose and the advisability of the requirement that the Secretary establish "a list of supplementary observer providers" and allow vessel owners to "employ a supplementary observer provider." In addition, it is not clear why the section authorizing the Secretary to charge a fee to cover observer costs apparently has been deleted. It might be desirable, in some regions, to allow the Secretary to contract with a non-governmental organization to train and place observers, and to collate and analyze data collected by the observers. Similarly, it might be desirable to allow the Secretary to certify that observer programs developed voluntarily by fishermen or fisheries' groups meet minimum training and other standards. However, to ensure comparability and avoid possible bias, the Secretary must retain responsibility for deciding such things as the level of observer coverage necessary, how vessels

are selected for observation, and what and how catch, effort, and other data are collected, recorded, reported, and analyzed.

Finally, the Commission believes it would be desirable to clarify, either in the statute or in the accompanying legislative report, the sections of the Bill concerning "Penalties and Enforcement" and "Establishment of [a] Pinniped Interaction Task Force." As presently drafted, the section concerning "Penalties and Enforcement" could be interpreted to mean that a fisherman cannot be prosecuted for illegally taking or failing to report taking a marine mammal if it cannot be shown that he or she was aware of, and knowingly violated, the reporting requirement or regulations regarding taking. Such a situation would make enforcement nearly impossible, and could best be avoided by continuing the vessel registration requirement, and making it illegal for a vessel to engage in a fishery if it is not properly registered, as presently is the case under the interim exemption program established by the 1988 Marine Mammal Protection Act Amendments.

The penalties set forth in this section also may be subject to differing interpretations. Subparagraph (1) states, for example, that on the first occasion of non-compliance, the Secretary shall "withdraw all fishing rights and privileges of that person or vessel for 30 consecutive days." It could be interpreted to mean that the person or vessel found guilty of non-compliance will not be allowed to fish during the first 30 days after the finding of non-compliance or, alternatively, that the person or vessel found guilty of non-compliance will be unable to participate for 30 consecutive days in the fishery in which the violation occurred. If the fishery in question lasts only a few days or few weeks, the penalty in the first case could be non-punitive in that it could be imposed during a period when the fishery is not operating; in the second case the penalty could be excessively harsh, preventing the person or vessel from participating in the fishery for several years.

Section 7 of the Bill directs the Secretary, in consultation with the Marine Mammal Commission, to "establish a Pinniped Interaction Task Force to advise the Secretary on management practices regarding pinnipeds interacting in a dangerous or damaging manner with salmonid fishery resources." It is not clear to the Commission what is meant by "interacting in a dangerous or damaging manner." Further, it is not clear why the Task Force is only to consider interactions with salmonid resources. In addition, it is not clear whether the Secretary would be obligated, in any way, to act or otherwise respond to the advice provided by the Task Force.

In summary, the Commission believes that the proposed Bill represents a comprise which, in most respects, would establish a regime to govern incidental taking of marine mammals in the

course of commercial fishery operations that would be both reasonable and workable, at least in the short-term. However, there are a number of uncertainties which should be clarified to ensure that, in the long-term, the regime will adequately protect marine mammals and at the same time minimize hardships on fisheries.

Thank you Mr. Chairman and members of the Committee for this opportunity to advise you of the Commission's views on this important legislation. I would be pleased to try to answer any questions that you may have.

Center for Marine Conservation

TESTIMONY OF THE CENTER FOR MARINE CONSERVATION
Before the
Subcommittee on Environment and Natural Resources
House Merchant Marine and Fisheries Committee
August 4, 1993

Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to present our views on H.R. 2760, legislation to amend and reauthorize the Marine Mammal Protection Act (MMPA). My name is Suzanne Iudicello; I am counsel for the Center for Marine Conservation. The Center served as the coordinator for the conservation groups who participated in the negotiations with fishing groups and who endorse the Conservation and Fishing Community Negotiated Proposal submitted to you on June 10, 1993: the Animal Protection Institute, Friends of the Sea Otter, Greenpeace, National Audubon Society, The Marine Mammal Center, and the World Wildlife Fund.

Our testimony addresses (1) our concerns with H.R. 2760; (2) the need for a system that not only replaces, but improves upon the interim exemption, and (3) our views on revisions to H.R. 2760 that would make it the vehicle for such a program.

I wish to preface my remarks by thanking the Committee for its encouragement to the conservation and fishing communities to work together to find common ground and creative approaches to incidental take. Too often adversary interest groups forget that once we make someone part of the solution, they are less likely to be part of the problem. The opportunity to work together on incidental take issues first presented itself as early as six years ago with cooperation on the control of high seas driftnets, continued during the 1988 Amendments to the MMPA, and through the development of the present joint proposal. This work has always been encouraged by Members of the Committee, and we appreciate your direction and confidence.

Although the House bill does include three aspects of the negotiated proposal--a scientific peer review group, a general authorization, and conservation teams--we are concerned that it does not integrate the two most important thrusts of our approach, namely to put priority attention on problems, and to reduce takes over time.

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Testimony of the Center for Marine Conservation

1. The House Bill Does Little More than Continue the Interim Exemption

From a conservation perspective, the thrust of any incidental take regime should be to reduce fishing-caused mortality so that marine mammal populations can recover to their optimum sustainable population. The House bill appears to be a quota-based regime that does little more than continue the current exemption program with the addition of increased observer coverage and draconian penalties for administrative violations. It does not prohibit intentional shooting of marine mammals--a prohibition that even the commercial fishing industry has endorsed. Nor does it provide a means to reduce mortality toward the zero rate mortality goal, focus priorities on marine mammal stocks of greatest concern, or provide implementation tools that will make fishermen part of the solution rather than part of the problem.

A comparison of six elements of the bill with similar elements in the negotiated agreement reveals the following:

Joint Agreement	H.R. 2760
• Prohibits intentional shooting.	• Silent on intentional killing.
• Requires as part of authorization a reduction of fishing-caused marine mammal deaths to a biologically conservative removal level in the first six months after enactment.	• Provides for Secretarial emergency action one year after enactment if review of information shows fishing caused mortality is likely to exceed the removal level.
• The time from from enactment to publication of conservation plans and implementing regulations is 19 months for fisheries interacting with a critical stock where mortality exceeds the calculated removal level.	• The time from enactment to publication of conservation plans and implementing regulations is two years for fisheries interacting with a critical stock where fishing mortality exceeds the potential biological removal level, and nearly two and a half years for other critical stocks.
• Scope of program is narrowed to focus on marine mammal stocks of greatest concern, and fishing that causes population declines or a substantial portion of mortality. As	• Scope of program extends to so many fisheries that mandated levels of observer coverage and enforcement will be difficult to meet with available fiscal resources. Enforcement is

such, both observer coverage and enforcement are directed at problem areas and on illegal takes, not administrative violations.	directed at administrative requirements rather than at reducing or penalizing takes.
• Instead of setting quotas for marine mammal mortality, directs effort at reducing mortality over time, with benchmarks and checkpoints to insure that incidental mortality caused by fishing declines over time.	• Creates quota-based system that sets caps on marine mammal mortality without any mechanism to reduce mortality over time to meet the MMPA's zero mortality rate goal.
• Encourages the use of an array of tools that will bring innovative approaches to reducing incidental mortality: education; early involvement of stakeholders; examination of other sources of mortality including predator-prey relationships; moves toward an ecosystem-based management approach.	• Employs traditional, centralized regulatory regime with standard Secretarial control of timing and action. Does not distinguish fishing-caused mortality from other sources of human-caused mortality in its regulatory approach.

The difference between the two proposals is not simply that one is the result of negotiation and compromise. There is a fundamental difference in approach based on the personal experience of fishermen with the Interim Exemption, and our thorough analysis of its results. That difference is focus. We used our knowledge of the information generated by the program to hone in on areas where incidental take in fishing operations is really a problem. We used our experience of how the program worked--or didn't--to craft an approach that would be successful in the field.

When we analyze the information generated by the MMEP, several conclusions emerge. The MMEP was designed to gather information about incidental take. It approached the task with an across-the-board registration system for two out of three categories of fisheries, required self-reporting in all, and required observer placement on a few. The MMEP provided accurate estimates of incidental mortality where the agency acquired reliable information on the number of vessels fishing, registered most of those vessels, received reports

from most of them, and observed enough to statistically verify the reports. Where one or more of those factors was unknown or unreliable, and where it could not be backed up by observer data, the information generated is questionable.

Based on our analysis of the MMEP, we have concluded that universal registration may not be the most effective means to assess incidental takes in fisheries. Further, the results of the program demonstrate two additional problems with universal registration, and three successful elements that should be included in any future regime to govern incidental mortality, namely:

- Universal registration generates an enormous administrative burden for the agency, causing time lags that may preclude recognition of trends or implementation of effective in-season management.
- Enforcement of a registration and reporting requirement consumes tremendous amounts of time, staff energy and money, and does little to improve the quality of data collection, since it is invariably after the fact.
- Education appears to be more effective than enforcement in bringing participants into a program and keeping them in compliance.
- Observers can contribute significantly to our understanding of the nature of interactions.
- In the absence of on-board observers, alternative means of observing and verifying incidental take can be used effectively.

It appears that H.R. 2760 replicates many of these problems, and therefore likely will fail in attaining accurate estimates of incidental mortality. While it does not propose a "universal" registration for fishing vessels, registration is required for vessels that interact with so many classifications of marine mammal stocks that it is nearly universal. As already stated, if you do not have an accurate picture of the "fishing universe," you will never elicit an accurate assessment of incidental take in fishing.

Further, H.R. 2760, in its registration requirements, does not make use of existing registrations or permits, or call for an integration of state and federal fishing permits in order to do so and avoid a duplicative requirement. In actuality, we believe that the means to capture that picture is registration of fishing vessels for fishing purposes--either through existing state, tribal, and federal permitting programs, or through a universal fishing license and a registration program that should be required through the Magnuson Fishery Conservation and Management Act. Not through the MMPA.

Finally, the registration system proposed by H.R. 2760 will probably fail to reduce incidental mortality or encourage any in-season management of its quota-based system. Part of the reason for this will be the sheer volume of information generated by such a registration and reporting requirement. The MMEP proved that it was unable to handle, process, and analyze that amount of information in time to act upon it, even if a problem emerged. Therefore even though the bill proposes Secretarial emergency regulatory authority, similar authority in the MMEP was never used for purposes of in-season management or to address an emerging incidental take problem in a fishery.

The enforcement and penalties, while severe, appear to be aimed only at administrative violations. Since Section 6 includes no prohibition of any kind on the take of marine mammals--not for intentional takes, not for takes above PBR, not for takes by vessels without a permit--the only violation for which a vessel could be held liable and required to tie up at the dock would be failure to register, display a decal, take an observer, or report a lethal take of a marine mammal. This reflects exactly the enforcement problems that emerged from the MMEP. We can spend lots of time and money tracking down vessel owners who didn't complete their paperwork, but we question what that does to reduce marine mammal deaths or encourage improved fishing practices.

Education is a critical element in the equation. We can impose rigid command and control regulatory programs on fishing operations, but without the vast sums of money necessary to observe and patrol miles and miles of coastline and ocean, it is doubtful whether such regimes could be effective in changing behavior. The way to change the way people fish, or the way they view and treat marine mammals, is by working with them. As a community who often have been in the position of hammering on the fishing industry, we know whereof we speak. Not only did we achieve tremendous strides in understanding each other's point of view in the course of our negotiations, objective data from the MMEP illustrate the difference that education can make in reducing marine mammal mortality. Registration, reporting, and compliance were demonstrably higher--and shooting mortality lower--in fisheries where industry associations conducted outreach programs and where peer pressure was brought to bear.

Observers unquestionably contribute to our understanding of not only the level of incidental take, but also the way vessel/marine mammal interactions occur. Their own statistically reliable data collection also provides a basis against which we can verify self-reporting. Comparison of observer data to logbook data indicates that on average mortality rates recorded in observer data were five to nine times greater than those recorded in logbook data. However, what is

important is to deploy our finite observer resources where it is most critical to obtain accurate, in-season information. The mandatory levels of observer coverage set out in H.R. 2760 will, without some alternative funding source, consume more dollars than all our marine conservation budget line items can afford. Yes, we need observers, but how many, and where? Finally, we must employ alternatives to the traditional on-board observer approach. The MMEP showed that these methods can be effective in accumulating and verifying data. H.R. 2760 is silent on the use of platforms of opportunity, video, dockside interviews, and other alternatives to on-board observers.

In summary, while the Interim Exemption Program had its difficulties, it also taught us some lessons. It is now time to learn from the program and improve upon it--not perpetuate and exacerbate its least successful elements. If we take a lesson from the last five years, it should be this: target management and enforcement efforts on real problem areas, involve interested parties early in the process, encourage participation and compliance through education and outreach, and employ innovative, yet statistically reliable, means to gather, verify, analyze and disseminate data generated by the program. We believe the following changes to H.R. 2760 will accomplish these objectives.

3. Recommendations to Improve the Conservation Impact of H.R. 2760.

We make the following suggestions in the hope that we can work with the Subcommittee as you continue your deliberations on the reauthorization of the Marine Mammal Protection Act. We have provided specific recommendations on the language of the bill in a separate document.

1. Prohibit intentional shooting of marine mammals. It is a considerable source of mortality in some fisheries and runs counter to the purposes and policies of the MMPA. Since a large segment of the industry has already agreed to stop the practice, why not make it clear in the law?

2. Tighten up the timing on decision points. The deadlines for action called for in the bill take too long, in our view, for action that will bring mortality below PBR for critical stocks.

3. Create a mechanism to reduce takes. There are no benchmarks in the bill, or requirements that would encourage the reduction and avoidance of marine mammal interactions over time.

4. Clarify the relationship between MMPA and ESA. While the small take authorization approach in the bill is a good start, the specific language leaves in question whether the small take permit or the outcome of an ESA §7 consultation will be the controlling factor. It should be made clear that any small take permit for endangered or threatened marine mammals is conditioned not by PBR, but by the terms and conditions of the incidental take statement that results from the ESA consultation and biological opinion.

5. Make the regulatory focus more precise. It is unclear whether the approach in the bill is aiming at all human caused mortality or fishing caused mortality. Although the requirements are on fishing vessels that interact with certain stocks, there appears to be no distinction made about whether fishing is the reason for the problem. It won't do much good to regulate fishing vessels with a quota if the source of mortality is found elsewhere. The regulatory focus of the program could be made narrower yet by integrating consideration of the condition of the marine mammal stock and the level of the fishing caused mortality. By registering, observing, and convening conservation teams for nearly all the fisheries that interact with marine mammals, the approach in the bill puts us where we've been for more than 15 years: trying to do too much with too little. The results of the MMEP point us to the problem areas, and we should hit those hard first. The bill would be improved by a more precise priority-setting approach.

6. Prohibit and penalize bad action, not sloppy paperwork. There are no prohibitions in the bill on shooting marine mammals, on takes above PBR, or for failure to reduce takes over time. The only requirements are administrative. As such, the penalties appear to punish bad record keeping instead of bad fishing practices, and will likely do little to reduce incidental mortality. At a minimum, there must be a requirement to get mortality below PBR much sooner than required by the bill.

Finally, while we recognize that the Subcommittee is concentrating its efforts on the incidental take elements of the MMPA, there are several other important issues that emerged from our discussions with the fishing industry, and on which we came to agreement. We mention them here for the record, and look forward to early action on them as soon as you take up other aspects of the MMPA during this reauthorization. Namely, a prohibition on feeding marine mammals in the wild, a provision to enable citizens to use non-injurious methods to chase marine mammals that are damaging private property, and, most importantly, a consideration of the interrelationships of marine mammals with the entire marine ecosystem.

In conclusion, we believe it is time to move on to solving problems. We have learned a lot from the Interim Exemption you enacted five years ago. The size of the problem appears to be more manageable than we knew five years ago: of the 81 stocks of marine mammals that are subject to incidental mortality from fishing operations, fishing caused mortality is significant for fewer than one quarter, and may be a factor for a half dozen others. This significant interaction occurs in fewer than a dozen fisheries. We learned that where industry associations took the initiative to educate and apply peer pressure to their members, registration and self-reporting were far more successful than in fisheries where there was no such effort. We learned that across-the-board logbook requirements did not provide much useful information without some additional means of verification. We learned that the price of mandatory levels of observer coverage was beyond our fiscal capability. We learned that intentional killing of marine mammals is a considerable source of mortality in some fisheries.

We urge you to consider using the targeted approach of the Joint Proposal in revising H.R. 2760 because it builds upon what we've learned about the problem of incidental take of marine mammals. In our view, this approach will advance us from documentation of a problem to problem solving, and will move the fishing industry from being part of the problem to being part of the solution.

Thank you again for this opportunity to testify. We look forward to working with you as you continue your deliberations on the reauthorization of the MMPA. I will be pleased to answer any questions from the Subcommittee.

Comments of Brad Gilman
On Behalf of the Gulf of Alaska Coalition
before the House Environment and Natural Resources
Subcommittee on the Reauthorization of the
Marine Mammal Protection Act

Mr. Chairman, the following are the specific comments of the Gulf of Alaska Coalition on the proposed MMPA Amendments of 1993. The Coalition is comprised of coastal communities, fishermen, and seafood processors located and operating in the Southwest region of Alaska. We include the Aleutians East Borough, the Kodiak Island Borough, the Peninsula Marketing Association, and the Alaska Groundfish Data Bank.

While I do not represent other participants in the Industry-Environmental Negotiating Group, I have done my best to consult with these individuals in preparing for this hearing. I believe that my comments are generally reflective of the West Coast participants not in attendance at this hearing.

The legislation introduced last week has assured me that this Committee, under your leadership, intends to resolve the incidental take issue this year in a manner that provides for effective marine mammal conservation while treating fairly the various citizens of the United States who interact with these animals. We agree with the fundamental goal of your bill, however, we disagree with the way in which the bill is currently drafted.

From the comments of the sponsors of the bill when it was introduced, it is clear that the Committee has sought to incorporate the Negotiating Group's proposal into the MMPA. Last week I began a comparative analysis in preparation for this hearing. It became quickly apparent that you and your staff were not afforded with sufficient information from us on many of the issues underlying the Negotiating Group's compromise. Our concept paper was poorly articulated on many important issues, and many of the most important assumptions underlying the compromise were implicit and not readily discernable.

The members of the Negotiating Group struggled for five months to find a balanced solution to the problems now facing the Committee on this issue. Over this five month period we began to understand the concerns and priorities of the fishing and conservation constituencies. Our task is now to share this understanding with you.

We did reach one fundamental agreement at the outset--any long-term conservation program must be capable of surviving the vagaries of Federal funding in the era of deficit reduction. Instead of creating an ideal program and then trying to figure out how to fund it, we came up with a proposed program which will give the Secretary the tools to develop an effective mammal conservation

regime, and the flexibility to establish priorities on how to use available funds.

We believe that this is the fundamental difference between our compromise proposal and your bill as technically drafted. Your bill appears to create mandates where discretion and creativity are necessary. Your bill must have sources of new funding, other than the current level of Federal appropriations, in order to work. Our proposal assumes baseline funding, but is capable of absorbing other sources of funding when available. We attempt to take the resources at hand and deal with the most critical of the stocks not already receiving heightened protection under the ESA. While well intentioned, your bill as drafted simply would try to do too much, too soon. It overlaps existing State and Federal fishing participation registries, and would duplicate the conservation protections being afforded under the ESA. We had hoped that the MMPA incidental take regime would be used as a tool to prevent listing under the ESA, to the extent direct human interactions are a cause of the decline.

It is my understanding that the Committee is considering a quick markup on the Chairman's bill tomorrow. Again, we do not support the bill as drafted. Should you move forward with the markup tommorrow, we hope that you will be open to further discussions prior to the time action is taken on the Floor of the Full House.

The following are my specific comments on the provisions of your bill. Where appropriate, I also try to draw a comparison to the Negotiated Proposal, where appropriate. We do recognize that our Negotiated Proposal is not clear in many instances. We hope that this testimony will serve to clarify the intent behind the Proposal.

1. Section 3(a). Small Take Provisions

The Secretary of Commerce has existing authority to regulate small takes of threatened and endangered species under the ESA by requiring the development of "reasonable and prudent measures" which avoid jeopardy to the listed stock. This authority includes the ability to limit incidental lethal takes when necessary. A separate small take permitting process for endangered species under the MMPA, as set forth in your bill, is not necessary.

Our Proposal would call for incidental takes of threatened and endangered species to be deemed a Federally-authorized action for purpose of Section 7 of the ESA for both Federal and State fisheries for threatened and endangered species. This assures that all listed species are covered by the ESA. Our intent was to cover all remaining marine mammal stocks not under an ESA listing, particularly pre-threatened stocks, under the proposed conservation

regime in the Compromise Proposal.

2. Section 6(d)(4). Zero Rate Mortality Goal

Reference is made to "reducing incidental lethal takes to insignificant levels approaching zero". The Zero Rate Mortality Goal, in contrast, requires a reduction in the "rates" of incidental takes to insignificant rates approaching zero. We support inclusion of the Zero Rate Mortality Goal if it is based on mortality rates and is not a mechanism to mandate "zero take".

3. Section 6(d). Authorization to Take Marine Mammals.

We recommend a revision of Section 3(d) with respect to the registration issue. The State of Alaska and the Pacific Northwest already have comprehensive systems to track and record fishing effort in the state-regulated fisheries. The Federal government has a similar system to track fishing effort in the Federal fisheries in these regions. There are also fourteen fisheries in the East Coast operating under Magnuson Act vessel registries. These systems should be used by NMFS in lieu of creating and administering a separate registration system to develop the basic understanding of levels of fishing participation. NMFS can use observer data and self-reporting of lethal takes to conduct its analysis of fishery/marine mammal interactions. Fishing participation information and lethal take information could then form the basis of any interaction analysis.

Federal funds should instead be directed at developing a registration system only for those state and/or federal fisheries for which comprehensive fishing participation data is not available. In our Compromise Proposal, we intended that it would be a primary role of the conservation teams to assist the Secretary in determining whether existing Federal, State, or Tribal registries are available and can be used to analyze the interactions between marine mammals and commercial fisheries. To the extent that such registries do not exist or are inadequate for a given fishery, we agree that some registration system should be created to fill in the gap. Forms for self-reporting lethal takes should, to the extent possible, be conformed to the existing Federal, State, or Tribal registries. Another role of each conservation team may be to advise the Federal Government or the respective States on how their systems may be coordinated with the conservation team effort.

4. Section 6(f). Monitoring Incidental Lethal Takes

We believe that this section should be revised in a number of ways. First, observer funding should be directed only at critical stocks or, in the case of non-critical stocks, the Secretary determines there is some significant deviation in fishing behavior which merits further scrutiny. MMPA observers are not necessary

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for endangered or threatened species. The Secretary has the authority under the ESA to require observations when necessary to avoid jeopardy to threatened or endangered species. Observers should be placed in fisheries which interact with mammal populations in trouble which are not receiving the heightened protection of the ESA.

Second, mandated levels of observer coverage are not necessary. The mandatory levels of observer coverage in the current bill might encompass thousands of vessels nationwide. Funding is simply not there for this level of observer coverage, nor is there any policy reason for such a comprehensive observer program. In consultation with the conservation team, the Secretary should instead develop a verification regime that meets the facts and circumstances of the fishery and mammal stock in question. Funding should be directed at observing the mammals stocks deemed most critical by the agency in any given fiscal year.

Our Proposal provides the Secretary with the discretion to identify the appropriate level of observer coverage, while recognizing that the costs of observers must be balanced with the need to perform population assessments, develop registries when necessary to understand the fishing vessel participation, and fund the conservation team. In some fisheries where the lethal interactions are extremely high, we might very well need 100 percent observer coverage. In other fisheries where prior observations have demonstrated low mortality rates, periodic alternative observer programs to update rates of interaction may be all that is necessary.

5. Section 6(g). Penalties and Enforcement.

The proposed penalties are too severe. They make no distinction for the severity of the violation. Is it fair to shut fishermen in New England down for thirty days for a first violation for forgeting to put an MMPA decal in the wheelhouse? Is an Alaskan fisherman in a state-regulated fishery that lasts only thirty days to be made bankrupt because he failed to report a lethal take and is caught? We strongly recommend that the Committee use the traditional civil fines and not license revocation to enforce the statute. The level of fine should be commensurate with the severity of the violation.

Our proposal did not discuss enforcement provisions, such as civil penalties. We agree that this is an issue which should be addressed so that the Secretary has the ability to enforce any measures recommended by the conservation team and adopted through regulation.

6. Definitions Section. Factors defining "Potential Biological Removal".

The draft definitions of "critical stock" and "potential biological removal" are both vague and may not give enough flexibility to the Secretary to establish priorities with respect to the use of available funding.

In the case of "critical stock", a key test is whether or not the stock is below its maximum net productivity level (MNPL), which is currently below the lower bound of the OSP range. Presumably, most marine mammal stocks are below this level, since the draft NMFS proposal lists only 6 of 64 stocks at OSP. To determine whether the stocks are "critical", we must then determine whether a level of takes would "significantly delay" rebuilding to MNPL. In its earlier proposal, NMFS defined a "significant delay" as an increase of 10 percent or more. The current NMFS techniques for assessing a stock's status relative to MNPL can theoretically determine whether a stock is above or below that level, but they cannot determine what MNPL is if the stock is below. We are faced with the practical reality of California sea lions and Washington/Oregon/California harbor seals, whose numbers have been increasing at 6% to 10% per year for two decades and may now exceed historic population levels. If NMFS cannot even determine MNPL for these stocks, what level of takes will significantly delay progress toward this elusive objective, regardless of whether or not we agree on the definition of "significant"?

The problem with "potential biological removals" is similar. Either we assume that most populations are below MNPL and argue what levels of take would "significantly delay" rebuilding toward an unknown objective, or we assume that the status is uncertain and face an unduly restrictive take regime.

The practical result of this lack of clarity is that virtually all marine mammal stocks could be considered "critical", and virtually every fishery in this country should be required to carry observers at some mandated level. A vast "observer bureaucracy" would be created, and fishermen would likely be required to fund it.

In 1988 we assumed for the sake of developing a monitoring and tracking program that fishery takes may be a principal cause of marine mammal declines. The Interim Program has already shown us that in most cases, the incidental rates of fishery take are low. The proposed definitions, however, would continue to intertwine incidental lethal take with the causes for mammal populations being below OSP. The truth is that we will never have OSP determinations for many animals, and need to move away from the concept for purpose of developing a conservation program designed to meet the Zero Mortality Rate Goal by minimizing <u>accidental</u> takes.

We believe a definition of current carrying capacity must accommodate man's sustainable use of fish as one of the human caused factors which decreased historic capacity to the current

level. The definition in the bill is close, but it is questionable if fishing would qualify as an "irreversible" effect since, in theory, a cessation of fishing may cause an increase in carrying capacity for some species of mammals. We believe this issue should be postponed. Instead, the discussion should be focused on a conservation regime to protect mammals and to encourage the achievement of the Zero Mortality Rate Goal throughout the commercial fishing industry.

Mandatory recovery factors should be removed. We consider recovery factors to be policy determinations on the timing of recovery. The Secretary should be given discretion to adopt a recovery factor that meets the circumstances of the situation. With respect to the timing of recovery under a conservation team concept, special treatment should be afforded for minimizing the harm to Alaska Native subsistence users when subsistence is the primary source of the removal and the Secretary has decided to exercise existing authority under Sec. 101(b).

7. Sec. 7. Establishment of Pinniped Interaction Task Force

This section needs substantial revision. No authority is granted to the Secretary to authorize Federal or state wildlife managers to lethally remove nuisance pinnipeds. There appears to be no process for an applicant to seek and receive redress when methods of non-lethal deterrence have been exhausted and lethal removal is the only realistic solution to the problem.

8. Other Issues

First, the legislation is unclear about whether there will be a flat prohibition on intentional lethal takes. A definitive statement should be included in the bill.

Second, the legislation does not provide any authority for either the fishing industry or private citizens to use non-lethal methods of harassment to deter marine mammals from gear and catch or private property. Such authority must be included or fishermen will be facing a "taking" prohibition for trying to comply with the Zero Mortality Rate Goal. We have asked these animals nicely to stay away from the gear, and they have refused. Some form of harassment must continue to be authorized.

STATE OF ALASKA TESTIMONY
TO THE
HOUSE MERCHANT MARINE AND FISHERIES COMMITTEE
CONCERNING REAUTHORIZATION OF
THE MARINE MAMMAL PROTECTION ACT

August 4, 1993

Thank you, Mr. Chairman and members of the House Merchant Marine Fisheries Committee, for inviting me to present testimony regarding reauthorization of the Marine Mammal Protection Act (MMPA). My name is John Gissberg, and I will be presenting to you the position of the State of Alaska Department of Fish and Game

I. BACKGROUND

Marine mammals have always been of great significance to Alaska and its residents. The economic value of their pelts, oil, and baleen provided much of the incentive for the exploration and purchase of Alaska. For thousands of years, coastal Alaskans have relied on marine mammals for food and other materials essential for their subsistence, and that dependence continues today.

One of the principal issues of concern during the current reauthorization of the MMPA is the need to develop a workable solution to the problem of incidental take of marine mammals by commercial fisheries. Since the Act was first passed, Congress has recognized that it is inevitable that marine mammals will interact with fishermen, their gear, and their catch. Therefore, while setting a goal of reducing incidental take to "insignificant

levels," mechanisms have been provided to allow fisheries some take of marine mammals.

During the 1988 MMPA reauthorization Congress recognized the complexity of this issue, and instituted the "interim exemption" to provide time for gathering additional data and developing the details of a management regime. Unfortunately, the programs that were developed by the National Marine Fisheries Service (NMFS) to measure the level of incidental take and assess status of marine mammal stocks were not adequately focused. After 5 years, and approximately $30 million, we are still in a situation where questions basic to proper management remain unanswered because in most cases the information that resulted is incomplete and of uncertain reliability.

Among other things, the interim exemption to the MMPA required the Secretary of Commerce, in consultation with the Marine Mammal Commission, to develop and transmit to Congress proposed guidelines to govern the incidental taking of marine mammals in the course off commercial fishing operations. The proposed regime recommended by NMFS was described in a legislative proposal sent to Congress in November 1992. In spite of the serious lack of data on marine mammal populations and how they are affected by fisheries, the NMFS proposed a detailed and comprehensive system for regulating marine mammal-fisheries interactions. The system they described is unduly complex, fails to focus efforts on true problem areas, and would be extremely expensive to operate.

To avoid the problems that would be inevitable with the NMFS proposal, commercial fishing and environmental groups developed and agreed upon an alternative management regime. The negotiated proposal achieved several crucial goals: 1) it satisfies the MMPA objective of minimizing incidental take while allowing fisheries to continue to operate; 2) it is conservative and should help depleted populations recover and avoid depletion of healthy populations; 3) it ensures that attention and efforts are focused on true problem areas so that limited resources can be used most effectively; 4) it provides adequate mechanisms for the states, the fishing industry, environmental groups, and the public to have input into the management process; and 5) it avoids duplicative and burdensome requirements on fishing operations. The State of Alaska is in full support of the negotiated management regime recommended to you by the fishing and environmental groups.

The draft bill being considered by this Committee incorporates many of the good points of the negotiated regime. The proposed system for stock assessments, scientific working group review, conservation teams, and conservation plans would provide detailed guidance for federal agencies, and the opportunity for the affected states, interest groups, and the public to have substantial input into the management process.

There are, however, some important areas in which the draft bill deviates significantly from the negotiated regime. The State of

Alaska would recommend that the bill be amended to reflect the negotiated proposal more closely. Some important examples are provided below.

II. SPECIFIC COMMENTS

1. Critical Stocks

The fishing and conservation groups recommended that critical stocks be identified based on consideration of the level of take by fisheries and other sources in relation to population status of each marine mammal stock. The proposed method would provide clear criteria for critical stock definition, and ensure that effort would be focused on declining and small marine mammal stocks that are subject to relatively high levels of taking.

The definition of critical stocks in the draft bill lacks clear criteria, and may result in attention being directed to situations where marine mammal fishery interactions are not really a problem. In fact, it is hard to know from the definition proposed in the draft legislation what stocks would qualify for the critical category. Since there is some uncertainty about the status of most marine mammal stocks and information on level of take is incomplete, many species would probably qualify. This in turn could defeat the purpose of creating the critical stocks designation, which is intended to focus attention on those stocks and fisheries where there is a pressing need to take action before the marine mammal stock reaches depleted, threatened, or endangered status. This is the same problem we identified with

the regime proposed last year by NMFS.

A reading of the draft bill shows that the classifications that would result from implementing the bill's critical stocks provisions would be similar to the NMFS legislative proposal. A comparison can be made between this proposal and the list that would result from the criteria in the fishing-environmental negotiated proposal. The negotiated proposal examined 63 stocks and categorized 12 as critical. Four of those were in Alaska (harbor seal, harbor porpoise, Gulf of Alaska beluga, and western Arctic beluga). NMFS listed 31 of 49 stocks as critical (their class alpha), 7 of those are in Alaska (harbor porpoise, Gulf of Alaska beluga, western Arctic beluga, Steller sea lion, spotted seal, ribbon seal, and Bering Sea killer whale). There are a number of problems with the NMFS list.

The most obvious problem is that it is overly general and fails to focus attention on a select number of problem species. Clearly, a method that would identify two-thirds of all stocks as critical fails to focus on the true problem areas. Also, a consideration of the actual stocks identified as critical in Alaska shows that the NMFS method fails to select some of those that are either in trouble or that have significant interactions with fisheries, while at the same time it includes some species that are not in trouble.

For example, although a number of harbor seals are killed each year in Alaskan fisheries, and their populations in some areas of

the state appear to be significantly depressed, they are not on the NMFS list. However, the NMFS list does include spotted seals, ribbon seals, and killer whales; species that have virtually no lethal fishing mortalities or interactions, and which appear to have robust populations.

2. Potential Biological Removals

In contrast, the definition of "potential biological removal" in the draft bill is far too detailed and restrictive. It is derived from the definition provided in the NMFS proposed regime, and does not take into account the actual data that are and are not available on marine mammal stocks in areas like Alaska. Because the status of many stocks is uncertain, the NMFS method would calculate potential biological removal using minimum population estimates, very conservative growth rates, and unrealistically low recovery factors. This could result in the calculation of a very low potential biological removal for stocks that are actually large and healthy, but have not been adequately studied. Under this regime it would then appear that there is a critical conservation problem when one in fact did not exist. Unnecessary, and perhaps counterproductive, restrictions on fisheries or other activities could result.

The actual potential for a stock to withstand removals by humans is a complex function that depends on many biological and ecological factors. These factors will vary for each stock, and therefore the calculation of realistic potential biological

removal levels cannot be done with a single standard formula. The specific methods to be used to calculate removal levels should not be detailed in the MMPA or committee language, but rather should be left to the discretion of the scientific working groups, conservation teams, and the Secretary.

3. Pinniped Interaction Taskforce

The draft legislation includes provisions that would establish a pinniped interaction task force to deal with the issue of pinnipeds damaging salmonid fishery resources. However, no authority is granted to the Secretary to authorize Federal or state wildlife managers to lethally remove nuisance pinnipeds. Similarly, there appears to be no process for an applicant to seek and receive redress when methods of non-lethal deterrence have been exhausted and lethal removal is the only realistic solution to the problem.

This type of interaction is not a serious problem in Alaska at this time. However, when migratory salmon species are being affected elsewhere on the west coast, this could have major implications for Alaska's commercial fishermen if the fish stocks are depleted to the point that they require protection under the Endangered Species Act. There is therefore a pressing need to develop effective mechanisms for dealing with nuisance animal situations.

When a few individual animals from large healthy pinniped stocks are causing serious depletion of fish resources, management agencies should be allowed to use whatever means are necessary to alleviate the problem. Failure to respond in such circumstances is totally contrary to sound practices of wildlife management. Language should be added to the draft bill to require the Secretary to take actions that may be necessary to implement recommendations that are made by the pinniped interaction task force.

4. Authorization to Take Marine Mammals

We also recommend a revision to the draft bill with respect to vessel registration. The draft legislation authorizes the Secretary to register each vessel in a fishery that may take marine mammals that are endangered, threatened or critical, and requires that they display a decal showing registration is current. Such an approach was attempted by the NMFS during the 5-year interim exemption period, with mixed results. The program was duplicative, needlessly bureaucratic and extremely costly. After this experience, the State is convinced that vessel registration should be at the regional level, as an overall part of the fishery management regime.

On the west coast, the State of Alaska and other states already have comprehensive systems to track and record fishing effort in the state-regulated fisheries. The Federal government has a

similar system to monitor fishing effort in the federal fisheries in these regions. These systems track approximately 17,000 vessels licensed to fish commercially in Alaska. The current state and federal fishery registration system includes permits and vessel registration for each species fished, by gear-type, by area, by season. Fishery participation by vessel, species, gear, area, and season is verified through landing/sales documentation, harvest monitoring, surveillance, and fishery data entry. Additional monitoring is provided by shoreside and onboard observers.

Creating a new and overlapping system would be a waste of limited federal funds, and clearly duplicative and unnecessary. Federal funds should instead be directed at developing a registration system only for those state and/or federal fisheries for which comprehensive fishing effort data is not available.

5. Monitoring Incidental Lethal Takes

the draft bill will also create redundancy as a result of the requirement for mandatory levels of marine mammal observer coverage. The State believes there should not be a legislatively set level of marine mammal observer coverage. Mandatory levels of observer coverage discussed in the draft bill might encompass thousands of vessels nationwide, and in many instances could be duplicative or unnecessary. For example, in the North Pacific, existing crab and groundfish observers could accomplish the dual

task of monitoring the fishery and marine mammal interactions.

Considering that a single observer costs between $7,000-$8,000 per month, funding will be a major issue with this program. The State believes that funds and effort should be focused where they can make the most difference, to solve real and pressing problems. The application of observer programs should be targeted to fisheries where there is a demonstrable need for observation. This determination can best be accomplished through the conservation team process. The State believes that the Secretary should develop a verification regime, based on the recommendations of the conservation teams, that meets the facts and circumstances of the fishery and mammal stocks deemed most critical by the agency.

III. SUMMARY

Alaskans have a strong dependence on marine resources, and we are very concerned that they are effectively conserved. We support the regime proposed by the environmental/fishing negotiators. We believe that their proposal is practical, and provides for a workable approach to addressing marine mammal/fisheries interactions. We urge the Committee to make use of their hard work during this reauthorization of the MMPA, and develop amendments to improve the draft bill that will provide for properly balanced conservation programs.

Thank you for the opportunity to present this testimony on behalf of the State of Alaska.

TESTIMONY OF
SHARON B YOUNG
WILDLIFE CONSULTANT TO
THE INTERNATIONAL WILDLIFE COALITION
AND
THE HUMANE SOCIETY OF THE UNITED STATES

ON BEHALF OF
THE INTERNATIONAL WILDLIFE COALITION
THE HUMANE SOCIETY OF THE UNITED STATES
FUND FOR ANIMALS
NEW ENGLAND ANTI-VIVISECTION SOCIETY
AMERICAN HUMANE ASSOCIATION
EARTH ISLAND INSTITUTE
WHALE AND DOLHPIN CONSERVATION SOCIETY
AMERICAN CETACEAN SOCIETY
MARINE MAMMAL FUND
CETACEAN SOCIETY INTERNATIONAL
COUNCIL FOR COMPASSIONATE GOVERNANCE
AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS
CENTER FOR COASTAL STUDIES
IN DEFENSE OF ANIMALS
EARTHKIND USA
SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION
HUMANE SOCIETY INTERNATIONAL
DEFENDERS OF WILDLIFE

BEFORE THE
HOUSE SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

REGARDING

REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT; HR2760

AUGUST 4, 1993

Section 3. Small Take Provisions.

We are gratified to see that this bill would retain oversight of management of Threatened and Endangered marine mammals with the National Marine Fisheries Service. While we feel that requiring a section 7 consultation under the Endangered Species Act (ESA) would assist in providing information to monitor impact on these stocks, we do not feel that this addition is adequately protective.

The Section 7 process is not as protective as is generally believed. In 1992 the General Accounting Office and the World Wildlife Fund conducted separate reports on the results of Section 7 consultations in recent years. Their conclusions were virtually identical: (1)almost ninety percent of all consultations under the ESA are disposed of informally and without fanfare (2)over ninety percent of the consultations concerning activities sufficiently serious to be conducted formally resulted in findings of "no jeopardy"; and (3) of those few [consultations] that were conducted formally and found potential "jeopardy", nearly ninety percent arrived at "reasonable and prudent" alternatives that allowed projects to proceed.

Furthermore "Through a myriad of interpretive and regulatory means, only eighteen projects were terminated--less than one percent of formal consultations, and less than .02% of consultations overall. The alternatives implemented for dealing with controversial projects that impact threatened and endangered species have been strongly influenced by local and national politics." (from: O.A. Houck, The Endangered Species Act and its Implementation by the U.S. Departments of Interior and Commerce, University of Colorado Law Review).

In a report to the U.S. Fish and Wildlife Service by its own biologists, it was stated that up to sixty percent of vertebrate species listed under the ESA have recovery goals which could lead to species extinction. Furthermore, we are concerned that within the ESA, there is insufficient definition of jeopardy to allow adequate protection even under the Section 7 consultation provisions.

We are not convinced that consultations under Section 7 of the ESA are likely to result in "reasonable and prudent" measures sufficient to protect and recover ESA listed marine mammal populations. The Kokechik decision in 1987 reaffirmed the notion that taking even one individual from a depleted population may be sufficient to disadvantage that stock.

For these reasons, we do not support permitted takings of endangered species. We acknowledge that there may be an occasional accidental taking of an endangered species in the absence of a permit. Because we propose that there be no permits for takings, and to prevent penalty from accruing in the case of a truly accidental taking; we propose that in the event a vessel incidentally kills an animal from an endangered species, that take should be reviewed by an

and marine mammal take information, they need to know the number and nature of fishery operations which may interact with marine mammals, and this would require a broad based registry of vessels.

(c) Stock Assessments
We support a review of stock assessments by the Scientific Working Group, and a periodic review of these assessments, including identification of areas in need of further assessment.

(d) Authorization to Take Marine Mammals
We have five major areas of concern within this section:
(1)We are concerned that this general authorization to take marine mammals would shift the burden of proof from the user to the Secretary. The MMPA currently states that there is a moratorium on fishing unless the user can demonstrate that there is no disadvantage likely to occur if a taking is permitted. Under this legislation, takings are permitted unless the Secretary can demonstrate that disadvantage is likely to occur. We feel that this shift in burden of proof may lead to disadvantage to marine mammals and wish to see the current moratorium on takings remain in place, with the user bearing the burden of proof that no disadvantage is likely.

(2) Within this section we are also concerned with the registration provisions which only require registry of vessels interacting with threatened, endangered, designated depleted or critical stocks (section [A]). We have long advocated the need for a central registry of vessels. We are pleased to see that this legislation acknowledges the need for vessel registry, however we would like to suggest that all vessels be registered, not just those interacting with threatened, endangered, depleted or critical stocks. Without registration of all vessels, it may be difficult to verify that vessels are reporting interactions, and it is difficult to assign random observer coverage to determine that interactions are not increasing to a level which may become critical without monitoring. Under the system which is proposed fisheries with interaction problems which may significantly disadvantage stocks which are not currently on the critical stock list would escape registry, and would, therefore escape monitoring and oversight. For example, NMFS projected that the California Set Gillnet industry would likely be a Category I fishery due to levels of interaction with California harbor seals that would exceed the PBR. Yet this stock is unlikely to be categorized as a critical stock. Thus, this fishery would escape registration, monitoring and oversight by a Conservation Team, and the stock could be disadvantaged by an unregistered fleet. Until future stock assessments or other data indicated a significant decline below maximum net productivity, NMFS might be unaware of the problem and unable to act to prevent

representation from a variety of interests we would like to offer two comments:
(1)Any representative who is not a member of a fishing industry is "non-industry". We assume that the provision seeking equitable distribution of "industry and non-industry" was intended to mean equitable distribution of industry and conservation interests rather than equitable distribution of industry and all other representatives on the Team.

(2) We note that the Conservation team must include at least one member of the Regional Fishery Management Council. We believe that this was intended to assure that the Fishery Management Council plans do not conflict with Conservation Team recommendations and to assure that their perspective is included in formulation of the Conservation Plan. If so, then it is duplicative to also require the team to consult with the Regional Fishery Management Council, as stated in the legislation.

(f) Monitoring Incidental Lethal Takes
We strongly support the provision for monitoring to determine changes in stock status, identify changes in methodology, determine methods of reducing takes and to verify reporting of incidental takes. We feel that the specified levels of observer coverage and the priority for assigning observers is laudable. We have only two concerns with this section.
(1)We would like to be assured that, should funds be available, greater levels of observer coverage could be employed without being considered "overly burdensome". Currently, some fisheries may be required to take greater than 20% observer coverage, and we would like to see that in cases where the concern over the level of incidental take was immediate and great, these higher levels of coverage could be maintained. For example, the mid-Atlantic swordfish fishery is currently subject to 100% observer coverage due to their high interaction level with multiple stocks of marine mammals. This fishery should not be able to escape this level of coverage because the law stipulated 20% coverage and they felt that 100% was overly burdensome and unfair.
(2) We support use of observers from a number of authorized sources; however, we believe that NMFS should have the option to charge a fee for observer coverage, especially if a fishery requires a higher level of coverage due to a level of interaction that mandates greater scrutiny. We understand that in Alaska, the groundfish fisheries already have such a system to fund observer coverage to monitor fishery quotas, and believe that such a model bears investigation to determine its feasibility in other parts of the country and other fisheries.

initiate deliberations; deliberations should be initiated by an application to the Task Force.

Sections 8 and 9
We have no specific comments.

Section 10 Definitions
We support the definitions listed for critical stocks, maximum net productivity, and potential biological removal. Although we would recommend inserting in the definition of PBR the word "maximum", so that the definition would read that "potential biological removal means the maximum number of animals that may be removed...". With this one change, we feel that these definitions are clear and well founded and support the intent of the original MMPA.

We do not support the use of current carrying capacity. We ask that historic carrying capacity be retained as the basis for making determinations of Optimal Sustainable Populations (OSP). While we understand the concern with absent historic population abundance data, we remain concerned that switching to the use of current carrying capacity undermines the necessary protection of stocks which have been disadvantaged. We have previously testified that the case of the northern Right Whale is a classic example of the weakness in using current carrying capacity. Right whales once counted many thousands among their numbers and were considered quite abundant. Their current population probably does not exceed 500 individuals. They are critically endangered, and have enjoyed protection from exploitation for over 50 years. Despite this protection, their numbers have not increased. Long term stability in population is one of the most significant indicators of a population that is at current carrying capacity. Yet no reasonable scientist would argue that right whales are at their optimal sustainable population, and therefore deserve no special protection. This is but one illustration of a problem which potentially affects a number of stocks.

The fact that a population is not currently able to increase because of a degraded habitat, should not exempt them from protection from possible future exploitation. In fact, this disadvantaged status may warrant special long-term protection. This removes incentive for reversing degradation and denies them important protection from future harmful impacts. For these reasons we believe that historic carrying capacity should be used in making OSP determinations.

We have two other general concerns with this proposal that are not addressed in any of the previously mentioned sections: funding and evaluation.

Funding.

toward the zero mortality rate goal at the end of four years. If he/she finds at that time that insufficient progress has been made toward reaching that goal at the end of 10 years, then he/she would be charged with instituting regulations which would effect immediate reductions in all non-compliant fisheries. This would provide the needed interim evaluation of the program and would provide incentive for voluntarily reducing take.

We would also like to emphasize our concern that marine mammal mortality is likely to continue, and be difficult to control, as certain fish stocks decline and fishers turn to less discriminating techniques to maximize their success in catching target fish species (eg. gillnets, drift nets and pair trawling). By their very design, many of these techniques will ensnare any animal which encounters the gear, including non-target marine mammals, turtles and birds. We would urge this Committee to work to provide interface between the Magnuson Fisheries Conservation Act and the Marine Mammal Protection Act as well as the Endangered Species Act. Marine mammals and endangered species can only be protected from incidental take if the gear and technology which is used is designed to minimize interaction potential, and fisheries practices are managed and permitted in consideration of impacts of fisheries on other animals in the ecosystem.

The Marine Mammal Protection Act of 1972 was motivated by public desire to intercede in the plight of marine mammals. At that time commercial whaling aroused public concern. The deaths of young seals at the hands of commercial interests aroused great aversion. The tremendous loss of life of small cetaceans in the nets of the tuna fishery aroused outrage. Since 1972 a number of these concerns have been addressed. However some of them still echo in issues that we face today. How is wide-spread public affection for charismatic pinnipeds to be balanced against protection of commercial fishing interests? How is the loss of life of marine mammals incidental to commercial fisheries to be reduced in a manner that preserves the stocks of marine mammals and yet allows a way of life for many people to continue?

This legislation has made a laudable attempt to deal with these pressing issues. We strongly urge Congress to consider our concerns and re-authorize a strong Marine Mammal Protection Act in keeping with the spirit of the original Act and the wishes of the American people.

I would like to thank you once again, for the opportunity to address this committee with our comments and concerns. We would like to offer any assistance to you as you work to re-authorize this important environmental legislation.

MAINE SARDINE COUNCIL

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STATEMENT OF JEFF KAELIN
EXECUTIVE DIRECTOR, MAINE SARDINE COUNCIL

BEFORE THE
HOUSE COMMITTEE ON MERCHANT MARINE AND FISHERIES'
SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES

ON THE REAUTHORIZATION OF THE
MARINE MAMMAL PROTECTION ACT

August 4, 1993

QUALITY
MAINE SARDINES

Packed under exacting quality standards established by the State of Maine

Congressman Studds, members of the Committee, thank you for the opportunity to discuss the pending reauthorization of the Marine Mammal Protection Act with you today.

I am Jeff Kaelin, the Executive Director of the Maine Sardine Council. Maine's sardine industry consists of four companies operating six factories located between Bath and Lubec, Maine. These factories utilize about 35 thousand metric tons of Atlantic herring each year to produce more than $40 million worth of canned sardines and other canned herring products.

I am also here today as the Government Relations Coordinator for the Maine Aquaculture Association. Maine's aquaculture industry is becoming a stable industry - contributing more than $50 million to our state's economy - and has terrific potential for growth.

In addition to these responsibilities, I am also the President of the Associated Fisheries of Maine. This organization is an umbrella group of about 50 fishing-related businesses, and several fisheries associations - including the Maine Gillnetters Association - operating in Maine.

In behalf of these organizations, beginning in February, I participated in the negotiations between fisheries and environmental groups in an effort to provide Congress with an alternative to the National Marine Fisheries Service's (NMFS) proposed regime to govern the interactions between marine mammals and commercial fishermen after September 30. All of the groups that I represent and work with want to be part of a process that ensures both the viability of marine mammal stocks and commercial fisheries in our region. There are very few significant interactions between Maine's commercial fisheries and Gulf of Maine marine mammal stocks.

The draft bill which you have asked me to comment on combines elements of the NMFS proposed regime and the primary negotiated proposal which I will call the "critical stock regime". A recognition of the importance of the issues raised in the second negotiated proposal, concerning "The Intentional Lethal Taking of Pinnipeds", is also reflected in the Committee's bill.

In this statement, I will direct specific comments to portions of the draft bill and explain how these comments relate to the goals which the groups that I worked with attempted to reach through the negotiations over the past few months.

The Reduction of Mortality and Serious Injury

The Committee's proposal states that its immediate goal is

that "the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero". This same goal is also established for regional Conservation Teams which would be authorized by the draft bill.

Both the NMFS proposal and the negotiated critical stocks regime share the goal of reducing the rate of takes to insignificant levels approaching zero.

There is a fundamental difference between these two goals. The fishing industry is clearly ready to commit to reducing the rate of take of marine mammals when the viability of a marine mammal stock is being threatened and when alternatives can be developed to make it feasible to do so.

We do not, however, believe that it is necessary or wise to adopt a goal of reducing takes to a level approaching zero. The MMPA's existing goal of maintaining marine mammal stocks at optimum sustainable population levels does not require such a strict standard. The establishment of a zero take goal threatens the long-term viability of the U.S. seafood industry.

We ask the Committee to adopt the critical stock proposal's language calling for the reduction of takes "to insignificant levels approaching a zero mortality and serious injury rate".

The Scientific Working Group and Stock Assessments

The Committee's draft bill would establish a Scientific Working Group which would be required to develop preliminary stock abundance estimates which one would expect to be developed by the NMFS, utilizing information gathered during the Interim Exemption Program. While the Scientific Working Group would have a role in commenting on NMFS stock abundance estimates, we are unclear why the group should be established before those estimates are made.

The negotiated critical stock regime would establish a Scientific Evaluation Working Group that would peer review decisions and assumptions related to stock assessments already made by NMFS. This approach seems more efficient and productive to us.

Also, the responsibilities of our proposed scientific working group correctly go beyond just the consideration of fisheries interactions to include "investigating and monitoring other environmental changes that may bear on stock status, including research on any predator/prey relationships, toxic pollutants, and other ecosystem issues" when considering the health of marine mammal populations.

We encourage you to broaden the scope of any scientific working group that may be established and use that body to review

and comment on stock assessment and interaction decisions already made by the NMFS.

Authorization to Take Marine Mammals

The Maine Sardine Council's primary motivation for becoming involved in the negotiations was to work towards the development of a regime that would not threaten to shut down our Category III herring fishery due to any impacts that New England's sink gillnet fleet might be having on the region's harbor porpoise population. We signed on to the negotiated critical stock regime because we believe that this possibility would be eliminated by the proposal.

The NMFS' proposed regime would make it possible for any fishery interacting with a marine mammal stock of concern - such as, potentially, the harbor porpoise - to be shut down once a potential biological removal level of take was reached.

Unfortunately, the Committee's proposed regime mirrors the NMFS proposal in this regard. Also, like the NMFS proposal, according to the Committee's draft, herring fishery vessels would be required to register, pay fees to fish, and display "Marine Mammal Interactor" decals - even if the fishery is known to have no significant impact on the marine mammal species involved. This approach is difficult to understand. We must oppose it as an unwarranted regulatory burden and cost without scientific justification.

Conservation Teams

We are pleased to see the Committee adopt the regional Conservation Team approach suggested in the negotiated critical stock regime. Like those suggested in the negotiated agreement, Conservation Teams established by the Committee's bill would be selected from a broad cross section of interests.

While I do not directly represent the Maine Gillnetters Association, I worked closely with that organization during the negotiation process as President of the Associated Fisheries of Maine. At the close of the discussions, the Maine Gillnetters Association agreed to support the critical stock regime.

In my view, they took this position primarily because the Conservation Team concept represents a partnership between government and industry which is intended to develop strategies to mitigate takes while allowing for the continued viability of a fishery. As envisioned by the negotiated agreement, this approach will develop cooperation and, ultimately, will focus scarce resources where they can be expected to have the greatest impact.

Even though Maine's herring fishery could potentially be a

focus of a Conservation Team which may be established to consider the viability of the east coast harbor porpoise population, we are confident that - under the negotiated critical stock regime - our fishery will be recognized as already operating at an insignificant level of incidental mortality and serious injury rate of these animals.

With this negotiated proposal, because the use of permits and observers would be optional and used only where critical interactions are known to occur, our herring fishery would essentially maintain its existing Category III status. Under the Interim Exemption Program, no MMPA regulation of our fishery was found to be necessary. There is no evidence that supports any additional regulation in the future.

Monitoring Incidental Lethal Takes

We are opposed to the requirement in the Committee's draft bill that the Secretary shall place observers in each fishery operating under the general authorization to fish, in order to verify incidental lethal takes.

During the Interim Exemption Program, and in the negotiated critical stock proposal, nothing restricts the NMFS from placing observers in any fishery which may be of concern to the government. As a practical matter, the NMFS has placed observers in Category I and Category II fisheries in recent years where significant interactions between commercial fishing activities and marine mammals are known to occur.

According to officials of the NMFS, during the past three years, some $24 million has been spent on observers in the Interim Exemption Program. This expense has only resulted in a 6-10% coverage of Category I and II vessels in the U.S.

By requiring the Secretary to place some observers in each fishery, valuable resources will undoubtedly be drawn away from fisheries interactions which may be significantly impacting a marine mammal stock. By focusing on the remote likelihood of takes, the protection of critical stocks will be undermined.

It is with this understanding in mind that the negotiated critical stock regime allows a Conservation Team to recommend the use of observers where problems are known to be, or are suspected to be, occurring. We urge you to reconsider this more cost effective approach to the use of observers.

During our negotiations, it was widely recognized that the reporting of incidental lethal takes needs to be improved. It was also recognized that at least part of the problem lies in the NMFS not making simplified, standard reporting forms widely available to the commercial fishing industry. Not only were some fishing people

hesitant to report due to concerns about negative political fallout, but many did not know how to do so.

We ask the Committee to work with the NMFS in developing a reporting system that will work more effectively than that which has been in place during the past five years. We would be willing to assist in any way possible.

Penalties and Enforcement

The penalties suggested by the Committee's draft are too harsh and do not provide for differentiating between offenses.

Pinniped Interaction Task Force

The Maine Aquaculture Association did not take a position on the negotiated critical stock regime because the marine mammal interactions which Maine's salmon net pen industry is concerned about arise from the presence of robust harbor seal and gray seal populations in Eastern Maine where a new fishing industry is developing.

This situation represents a significant long-term impediment to the continued development of the marine finfish aquaculture industry in the northeast.

During the winter months of the past two or three years, Maine's $50 million salmon net pen industry has experienced losses from seal predation that are estimated to be as high as $5 million each year. These economic losses from damaged, stressed, and released fish are occurring even though all available predator control technologies are being employed.

In behalf of the Maine Aquaculture Association, I participated in the discussions that produced the "Intentional Lethal Taking of Pinnipeds" proposal. Unfortunately, our efforts to develop a regulated permitting system which allows for the continued intentional lethal taking of individual animals from robust seal populations - to protect gear and catch in the marine finfish aquaculture industry - ultimately failed.

Earlier this month, we asked NMFS Acting Assistant Administrator Dr. Nancy Foster to immediately establish an informal "Intentional Lethal Taking Task Force" in order to begin to consider the possible authorization of a general permit for salmon farmers before this winter.

We are pleased that the Committee's draft bill recognizes this problem by calling for the establishment of a Pinniped Interaction Task Force although this proposal does not appear to specifically authorize the Secretary to permit limited intentional lethal takes, to protect gear and catch, if a task force recommends this

approach.

Because there are other pinniped predation problems in the U.S., in addition to those being experienced in Maine, we ask that the establishment of regional pinniped interaction task forces be authorized in the Committee's bill. Just as regional Conservation Teams can be expected to better understand and develop mitigation strategies that will be effective in a given region, regional pinniped interaction task forces can be expected to perform most effectively, and in a timely manner.

We also ask that the representation on a task force be specifically expanded to include representatives of fishing industry organizations as that same opportunity has been extended to environmental organizations in the Committee's draft.

These brief comments attempt to respond to the Committee's draft reauthorization bill while touching on the major MMPA reauthorization issues which I understand to be of interest to several Maine fisheries. Many other technical issues could be discussed but I will instead respond to any questions which Committee members may want to ask me.

For the Maine Sardine Council, the Associated Fisheries of Maine, and the Maine Aquaculture Association, I want to thank you again for the opportunity to talk with you today about this very important legislation. We appreciate the Committee's record of support for our fishing businesses and look forward to continuing to work with you as this process continues.

I

103D CONGRESS
1ST SESSION

H. R. 2760

To authorize the Marine Mammal Protection Act for a period of 6 years, to establish a new regime to govern the incidental taking of marine mammals in the course of commercial fishing operations, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 27, 1993

Mr. STUDDS (for himself, Mr. YOUNG of Alaska, Mr. FIELDS of Texas, Mr. MANTON, and Mr. SAXTON) introduced the following bill; which was referred to the Committee on Merchant Marine and Fisheries

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A BILL

To authorize the Marine Mammal Protection Act for a period of 6 years, to establish a new regime to govern the incidental taking of marine mammals in the course of commercial fishing operations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Marine Mammal Protection Act Amendments of 1993".

SEC. 2. AMENDMENT OF MARINE MAMMAL PROTECTION ACT OF 1972.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.).

SEC. 3. SMALL TAKE PROVISIONS.

(a) Section 101(a)(4) (16 U.S.C. 1371(a)(4)) is amended to read as follows:

"(4)(A) The Secretary shall allow the incidental, but not the intentional, lethal taking by citizens of the United States while engaging in commercial fishing operations of small numbers of marine mammals listed as endangered species under the Endangered Species Act of 1973 if the Secretary determines, after notice and opportunity for public comment, that the total of such taking will not exceed the potential biological removal level established for that marine mammal stock or species under section 118(c).

"(B) For the purposes of this paragraph, a request for an authorization to incidentally lethally take marine mammals that have been listed as endangered species under the Endangered Species Act

of 1973 shall be considered to be sufficient to initiate a consultation under section 7 of that Act.".

SEC. 4. PERMITS.

Section 104 (16 U.S.C. 1374) is amended by striking the period at the end of subsection (a) and inserting "except for the incidental taking of marine mammals during the course of commercial fishing operations.".

SEC. 5. CONSERVATION PLANS.

Section 115(b) is amended—

(1) by striking the word "and" after the semicolon at the end of subparagraph (B);

(2) by striking the period at the end of subparagraph (C) and inserting "; and"; and

(3) by adding at the end the following new subparagraph:

"(D) within 6 months after determination of critical status, for any species or stock determined to be a critical stock under section 118.".

SEC. 6. TAKING OF MARINE MAMMALS INCIDENTAL TO COMMERCIAL FISHING OPERATIONS.

Title I (16 U.S.C. 1371 et seq.) is amended by adding at the end the following new section:

"SEC. 118. (a) TAKING OF MARINE MAMMALS INCIDENTAL TO COMMERCIAL FISHING OPERATIONS.—

"(1) Effective on the date of the enactment of the Marine Mammal Protection Act Amendments of 1993 and subject to subsection (d)(4), the provisions of this section shall govern the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States and vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act. In any event, it shall be the immediate goal that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching zero.

"(2) The provisions of the Endangered Species Act of of 1973 and section 101 of this title and not this section shall govern the incidental lethal taking of marine mammals listed as endangered under the Endangered Species Act of 1973.

"(3) The provisions of title III of this Act and not this section shall govern the taking of marine mammals in the course of commercial purse seine fishing for yellowfin tuna.

"(4) The provisions of the Endangered Species Act of 1973 and Public Law 99–625 and not this

section shall govern the incidental taking of California sea otters during the course of commercial fishing operations.

"(b) SCIENTIFIC WORKING GROUP.—(1) Not later than 60 days after the date of the enactment of the Marine Mammal Protection Act Amendments of 1993, the Secretary, in consultation with the Marine Mammal Commission and the Secretary of the Interior, shall establish a Scientific Working Group consisting of individuals with expertise in marine mammal biology and ecology, population dynamics and modeling, and commercial fishing technology and practices, to advise the Secretary regarding—

"(A) population estimates for those marine mammal stocks taken incidental to commercial fishing operations;

"(B) the population status and trend of such marine mammal stocks;

"(C) studies needed to resolve uncertainties regarding stock separation, abundance, or trends and factors affecting the distribution, size, or productivity of the stock;

"(D) studies needed to resolve uncertainties regarding the species, numbers, ages, gender, and reproductive status of marine mammals being inciden-

tally lethally taken in the course of commercial fishing operations; and

"(E) research to identify modifications in fishing gear and fishing practices likely to reduce the mortality and serious injury of marine mammals incidental to commercial fishing operations.

"(2) The Federal Advisory Committee Act shall not apply to the Scientific Working Group.

"(c) STOCK ASSESSMENTS.—(1) Not later than 120 days after the date of the enactment of the Marine Mammal Protection Act Amendments of 1993, the Secretary shall provide to the Scientific Working Group established under subsection (b) a preliminary stock assessment of all marine mammal populations which occur in waters under the jurisdiction of the United States. The preliminary stock assessment shall include—

"(A) the area in which each stock or population is located;

"(B) the best available estimates of minimum population abundance, distribution, stock separation, and current trend;

"(C) estimates of total lethal take by source for each stock and other factors that may impede recovery of that stock, including impacts on marine mammal habitat and prey;

"(D) a list of commercial fisheries interacting with each marine mammal stock, which includes—

"(i) the approximate number of vessels participating in the fishery;

"(ii) the level of interaction, specifying frequent, occasional, or rare incidental takes;

"(iii) seasonal or area changes in level of take; and

"(iv) the rate at which takes occur, specifying on a per day or per fishing operation basis;

"(E) the stock's status, specifying whether a species, stock, or population has been identified as having reached its optimum sustainable population, is depleted, threatened, endangered, or critical; and

"(F) a potential biological removal level for each stock and the factors used to calculate it.

"(2) The Scientific Working Group shall review the preliminary stock assessment and provide comments and recommendations to the Secretary not later than 60 days from receipt.

"(3) The Secretary shall take the recommendations of the Scientific Working Group into account and, not later than 45 days after the receipt of such comments and

recommendations, shall make the revised stock assessment available for public review and comment.

"(4) Not later than 1 year after the date of the enactment of the Marine Mammal Protection Act Amendments of 1993, the Secretary shall publish a final stock assessment of all marine mammal stocks which occur in United States waters. The assessment shall include all information required under paragraph (1) and any other information which the Secretary deems appropriate.

"(5) The Secretary shall review and publish, in consultation with the Marine Mammal Commission, the Secretary of the Interior, and the Scientific Working Group, updated stock assessments—

"(A) on an annual basis for those stocks considered to be critical; and

"(B) at least once every 3 years for all other marine mammal stocks.

"(d) AUTHORIZATION TO TAKE MARINE MAMMALS.—(1) Not later than 30 days after the date of the publication of the final stock assessment as required under subsection (e), the Secretary shall issue a general authorization for the incidental taking of marine mammals in the course of commercial fishing operations. Such authorization shall be accompanied by regulations issued by the Secretary requiring—

"(A) each vessel owner operating in a fishery identified in the final stock assessment as interacting with a marine mammal stock which has been—

"(i) listed as an endangered species or threatened species under the Endangered Species Act of 1973;

"(ii) designated as depleted under this Act; or

"(iii) identified as critical under this section,

to register with the Secretary by biennially completing a registration form providing the name of the vessel owner, the name and description of the vessel, the fisheries in which it will be engaged, and such other information as the Secretary deems necessary;

"(B) each vessel required to register under subparagraph (A) to display a decal or other physical evidence issued by the Secretary indicating that the registration is current;

"(C) all lethal takes of marine mammals to be reported to the Secretary at the end of each fishing trip;

"(D) each vessel to comply with all monitoring requirements established by the Secretary as provided in subsection (f); and

"(E) any other terms and conditions which the Secretary deems appropriate.

"(2) The Secretary is authorized to charge a fee for the granting of an authorization under this section. The level of fees charged under this paragraph shall not exceed the administrative costs incurred in granting an authorization. Fees collected under this paragraph shall be available to the Under Secretary of Commerce for Oceans and Atmosphere for expenses incurred in the granting and administration of authorizations under this section.

"(3) The Secretary shall review information regarding the incidental taking of marine mammals under the general authorization and evaluate the effects of such incidental taking on the affected marine mammal stocks. Incidental lethal takes for each marine mammal stock shall not exceed the potential biological removal level established in the final stock assessment required under subsection (c). If the Secretary finds that the incidental taking of marine mammals in a fishery is likely to exceed the potential biological removal level, the Secretary shall immediately consult with the appropriate conservation team established under subsection (e), Regional Councils, and States, and prescribe emergency regulations to prevent to the maximum extent practicable any further tak-

ing. Any emergency regulations prescribed under this paragraph shall—

"(A) to the maximum extent practicable, avoid interfering with existing State, interstate, or regional management plans;

"(B) be published in the Federal Register; and

"(C) remain in effect until the Secretary determines that the reasons for the emergency regulations no longer exist, or the end of the year for which the annual potential biological removal was calculated, whichever is earlier.

"(4) Until such time as the Secretary issues a general authorization under this section for the incidental taking of marine mammals during the course of commercial fishing operations, the provisions of section 114 shall apply.

"(e) CONSERVATION TEAMS.—(1) The Secretary shall establish a conservation team for each of the following regions and the adjacent economic zone in which incidental lethal takes of marine mammals occur:

"(A) NEW ENGLAND.—The New England region, consisting of the States of Maine, New Hampshire, Massachusetts, Rhode Island, and Connecticut.

"(B) MID-ATLANTIC.—The Mid-Atlantic region, consisting of the States of New York, New Jersey, Delaware, Maryland, and Virginia.

"(C) SOUTH ATLANTIC.—The South Atlantic region, consisting of the States of North Carolina, South Carolina, Georgia, and Florida.

"(D) GULF AND CARIBBEAN.—The Gulf of Mexico and Caribbean region, consisting of the States of Texas, Louisiana, Mississippi, Alabama, Florida; the Virgin Islands, and the Commonwealth of Puerto Rico.

"(E) PACIFIC.—The Pacific region, consisting of the States of California, Washington, and Oregon.

"(F) WESTERN PACIFIC.—The Western Pacific region, consisting of the State of Hawaii; Guam, American Samoa, and the Northern Mariana Islands.

"(G) NORTH PACIFIC.—The North Pacific region, consisting of the State of Alaska.

"(2) For those regions in which a marine mammal stock has been identified as a critical stock, conservation teams shall be established not later than 30 days after the publication of the final stock assessment required under subsection (c). For those regions in which no stock has been identified as critical, conservation teams shall be

established not later than 60 days after the publication of the final stock assessment.

"(3) Conservation team members may be drawn from the National Marine Fisheries Service, the United States Fish and Wildlife Service, the Marine Mammal Commission, States, Regional Councils, environmental organizations, the fishing industry, universities and scientific organizations, Alaska Native corporations, treaty tribes, and others as the Secretary deems appropriate. Each conservation team shall have at least one member of the coinciding Regional Council as a member. Conservation teams shall consist of an equitable distribution of industry and nonindustry representatives as practicable. Conservation teams shall not be subject to the Federal Advisory Committee Act; however, meetings of the conservation teams shall be open to the public.

"(4) It shall be the immediate goal of each conservation team to advise the Secretary, through the development of a conservation plan, on methods of reducing lethal incidental takes of marine mammals below the potential biological removal levels established under subsection (c) as quickly as possible, and on methods of reducing incidental lethal takes to insignificant levels approaching zero within 10 years. In developing a conservation plan, con-

servation teams shall consult with the States and Regional Councils.

"(5) In the case of those regions in which a marine mammal stock has been identified as critical, and for which total lethal takes are estimated to be greater than the potential biological removal level established in the stock assessment, the following provisions shall apply:

"(A) Not later than 6 months after the date of the establishment of a conservation team, the team shall submit a draft conservation plan for the critical stock to the Secretary.

"(B) The Secretary shall take the draft conservation plan into consideration and, not later than 60 days after the submission of the draft conservation plan by the conservation team, the Secretary shall publish a draft conservation plan and implementing regulations for public review and comment.

"(C) In the event that the conservation team is unable to submit a draft plan to the Secretary within 6 months, the Secretary shall publish a proposed plan and implementing regulations for public review and comment:

"(D) Not later than 60 days after the close of the comment period required under subparagraph

(B), the Secretary shall publish a final conservation plan and implementing regulations.

"(E) The Secretary and the conservation team shall continue to meet every six months to monitor the progress of the conservation plan.

"(F) The Secretary may make adjustments to the conservation plan and implementing regulations as necessary, which shall be published for public review and comment.

"(6) In the case of those regions in which a marine mammal stock has been identified as critical, and for which the total lethal takes are estimated to be less than the potential biological removal level established in the stock assessment, the following provisions shall apply:

"(A) No later than 11 months after the establishment of a conservation team, the team shall submit a draft conservation plan for the critical stock to the Secretary.

"(B) the Secretary shall take the draft conservation plan into consideration and, not later than 60 days following the submission of the draft conservation plan by the conservation team, the Secretary shall publish a draft conservation plan and implementing regulations for public review and comment.

"(C) in the event that the conservation team is unable to submit a draft plan to the Secretary within 11 months, the Secretary shall publish a proposed plan and implementing regulations for public review and comment.

"(D) Not later than 60 days after the close of the comment period required under subparagraph (B), the Secretary shall publish a final conservation plan and implementing regulations.

"(E) The Secretary and the conservation team shall continue to meet on an annual basis to monitor the progress of the conservation plan.

"(F) The Secretary may make adjustments to the conservation plan and implementing regulations as necessary, which shall be published for public review and comment.

"(f) MONITORING INCIDENTAL LETHAL TAKES.—(1) The Secretary shall establish a program to monitor incidental lethal takes of marine mammals during the course of commercial fishing operations. The purposes of the monitoring program shall be to—

"(A) determine potential changes in stock status;

"(B) identify unusual changes in fishing methods, including the introduction of new or alternative

fishing gear or practices, and the initiation of experimental fisheries;

"(C) determine methods of reducing incidental lethal take levels; and

"(D) verify reporting of incidental lethal takes.

"(2) For each fishery operating under the general authorization to incidentally lethally take marine mammals as provided under subsection (d), and consistent with the provisions of sections 114(e)(6) and 114(e)(7), the Secretary shall require that vessels operating in that fishery carry observers in order to obtain statistically reliable information required under this section. When determining the distribution of observers among fisheries and vessels within a fishery, the Secretary shall be guided by the following standards:

"(A) The requirement to obtain the best scientific information available.

"(B) The requirement that assignment of observers is fair and equitable among fisheries and among vessels in a fishery.

"(C) The requirement that no individual person or vessel, or group of persons or vessels, be subject to excessive or overly burdensome observer coverage.

"(D) Where practicable, the need to minimize costs and avoid duplication.

"(3) To the extent practicable, the Secretary shall require that vessels carry observers consistent with the following priorities:

"(A) 20 percent of the vessels in those fisheries with incidental lethal takes from marine mammal stocks identified as endangered species or threatened species under the Endangered Species Act of 1973 shall carry observers.

"(B) 20 percent of the vessels in those fisheries with incidental lethal takes from marine mammal stocks identified as critical shall carry observers.

"(C) 10 percent of those fisheries with high levels of incidental lethal takes from any marine mammal stock designated as depleted shall carry observers.

"(D) Observers may be required on vessels in any other fishery in which incidental lethal takes are likely to occur or in which the Secretary believes incidental takes may be occurring.

"(4) The Secretary shall establish a list of supplementary observer providers which shall consist of private companies, academic institutions, State agencies, and other appropriate entities which can provide qualified observers to a vessel required to carry an observer under this subsection. A vessel owner may choose to employ a

supplementary observer provider to meet the requirements of this subsection.

"(5) In order to be included in the list established under paragraph (4), a supplementary observer provider must demonstrate that—

"(A) individuals employed by the provider are citizens or nationals of the United States and have the requisite education or experience to carry out the functions required under this subsection;

"(B) standards of conduct for observers have been established equivalent to those applicable to Federal personnel; and

"(C) a standard system exists of collecting, analyzing, and reporting data at such time and in such form as is satisfactory to the Secretary.

"(6)(A) Any information collected under this subsection shall be confidential and shall not be disclosed except—

"(i) to Federal employees whose duties require access to such information;

"(ii) to State employees pursuant to an agreement with the Secretary that prevents public disclosure of the identity or business of any person; or

"(iii) when required by court order.

"(B) The Secretary shall prescribe such procedures as may be necessary to preserve such confidentiality, except that the Secretary shall release or make public any such information in aggregate, summary, or other form which does not directly or indirectly disclose the identity or business of any person.

"(g) PENALTIES AND ENFORCEMENT.—If the Secretary determines that a person using a vessel of the United States or a vessel with a valid fishing permit issued by the Secretary in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act has knowingly violated this section, the Secretary shall—

"(1) on the first occasion of noncompliance, withdraw all fishing rights and privileges of that person or vessel for 30 consecutive days;

"(2) on the second occasion of noncompliance, withdraw all fishing rights and privileges of that person or vessel for 6 consecutive months; and

"(3) use any other provisions of sections 105, 106, or 107 that the Secretary deems appropriate.

No penalty shall be assessed unless such person is given notice and opportunity for a hearing with respect to such violation. Any penalty may be remitted or mitigated by the Secretary for good cause shown.

"(h) CONTRIBUTIONS.—The Secretary may accept contributions of equipment or services for use in administering this section.

"(i) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Department of Commerce, for purposes of carrying out this section, $15,000,000 for each of the fiscal years 1994, 1995, 1996, 1997, 1998, and 1999.".

SEC. 7. ESTABLISHMENT OF PINNIPED INTERACTION TASK FORCE.

Section 104 (16 U.S.C. 1374) is amended by adding at the end the following new subsection:

"(i)(1) Not later than 60 days after the date of the enactment of the Marine Mammal Protection Act Amendments of 1993, the Secretary, in consultation with the Marine Mammal Commission, shall establish a Pinniped Interaction Task Force to advise the Secretary on management practices regarding pinnipeds interacting in a dangerous or damaging manner with salmonid fishery resources.

"(2) The Pinniped Interaction Task Force shall consist of designated employees of the Department of Commerce, individuals with expertise in pinniped biology and ecology and commercial fishing technology and practices, particularly aquaculture technology; and representatives

from States, environmental organizations, Alaska Native corporations, treaty tribes, and others as the Secretary deems appropriate.

"(3) The Pinniped Interaction Task Force shall advise the Secretary regarding—

"(A) the use of available alternative fishing gear or practices to mitigate the interaction;

"(B) in the event that no alternative gears are currently available, research into such alternatives; and

"(C) other means of mitigating the interaction, including the use of limited intentional lethal takes.".

SEC. 8. TREATY RIGHTS.

Nothing in this Act is intended to abrogate existing fishing or hunting rights reserved to Indian tribes by treaty with the United States.

SEC. 9. TECHNICAL AND CONFORMING AMENDMENTS.

The Act is amended—

(1) in the table of contents by inserting after the item relating to section 117 the following:

"Sec. 118. General authorization for commercial fisheries.";

(2) in section 101(a)(2) (16 U.S.C. 1371(a)(2)) by striking "permits may be issued therefor" and all that follows through "section 103." and inserting "an authorization may be issued therefor under this

section and section 118 subject to regulations prescribed by the Secretary.";

(3) in section 102(a) (16 U.S.C. 1372(a)) by striking "and 114" and inserting "114, and 118";

(4) by redesignating the title III of that Act that was added by section 3003 of the Marine Mammal Health and Stranding Response Act (106 Stat. 5060) as title IV;

(5) by redesignating each of the sections of that title in order as sections 401, 402, 403, 404, 405, 406, 407, 408, and 409;

(6) in section 401(b)(3) as redesignated by this section by striking "304" and inserting in lieu thereof "404";

(7) in section 405(b)(1)(A)(i) as redesignated by this section by striking "304(b)" and inserting in lieu thereof "404(b)";

(8) in section 406(a)(2)(A) as redesignated by this section by striking "304(b)" and inserting in lieu thereof "404(b)";

(9) in section 406(a)(2)(B) as redesignated by this section by striking "304(c)" and inserting in lieu thereof "404(c)";

(10) in section 408(1) as redesignated by this section—

(A) by striking "305" and inserting in lieu thereof "405", and

(B) by striking "307" and inserting in lieu thereof "407";

(11) in section 408(2) as redesignated by this section by striking "307" and inserting in lieu thereof "407";

(12) in section 409(1) as redesignated by this section by striking "305(a)" and inserting in lieu thereof "405(a)";

(13) in section 409(5) as redesignated by this section by striking "307(a)" and inserting in lieu thereof "407(a)";

(14) in section 102(a) (16 U.S.C. 1372(a)) by striking "title III" and inserting in lieu thereof "title IV";

(15) in section 109(h)(1) (16 U.S.C. 1379(h)(1)) by striking "title III" and inserting in lieu thereof "title IV";

(16) in section 112(c) (16 U.S.C. 1382(c)) by striking "or title III" and inserting in lieu thereof "or title IV"; and

(17) by amending the table of contents contained in the first section accordingly.

SEC. 10. DEFINITIONS.

Section 3 (16 U.S.C. 1362) is amended—

(1) by inserting the following new paragraphs (1) and (2) and renumbering all other paragraphs accordingly:

"(1) The term 'critical stock' means a marine mammal species or population stock—

"(A) which is below its maximum net productivity level and is not likely to rebuild to that level without significant delay unless action is taken to reduce human-caused mortality or habitat destruction;

"(B) which currently is above its maximum net productivity level but is likely to be reduced below that level unless action is taken to reduce human-caused mortality or habitat destruction; or

"(C) the status of which is unknown or uncertain, and the level of human-caused mortality is such that, based upon knowledge of comparable species or stocks, the Secretary has reason to believe that it may be causing the species or stock to be reduced or maintained below its maximum net productivity level.

"(2) The term 'current carrying capacity' means the largest average number of animals sup-

ported by the habitat within the historic range of a species or population stock prior to human-caused habitat degradation or enhancement, modified to take into account increases and decreases due to natural causes or human-caused effects which for all practical purposes are irreversible.";

(3) by inserting the following new paragraph (10) and renumbering all other paragraphs accordingly—

"(10) The term 'maximum net productivity level' means the population size, age, and gender composition at which the net annual increase in population size resulting from additions to the populations due to reproduction, less losses due to natural mortality, is maximized.";

(4) by inserting the following new paragraph (15) and renumbering all other paragraphs accordingly:

"(15) The term 'potential biological removal' means the number of animals that may be removed from a marine mammal population stock without causing that stock to be reduced to, or to be maintained for a significant period of time at, a level below its maximum net productivity level. Potential

biological removal levels shall be calculated as follows:

"(A) for a species or stock that is below its maximum net productivity level, that part of the net annual increment that can be taken without significantly delaying the time it will take the population to rebuild to its maximum net productivity level; or

"(B) for a species or stock whose status is uncertain, the product of the minimum population estimate times ½ of the best available estimate of population growth rate at the maximum net productivity level, multiplied by a recovery factor of—

"(i) 0.1 for populations whose minimum population estimate is less than 10,000; and

"(ii) 0.5 for populations whose minimum population estimate is greater than 10,000."; and

(5) by adding at the end the following:

"(18) The term 'Regional Council' means a Regional Fishery Management Council established under section 302 of the Magnuson Fishery Conservation and Management Act.".

SEC. 11. AUTHORIZATION OF APPROPRIATIONS FOR MARINE MAMMAL COMMISSION.

Title II (16 U.S.C. 1401 et seq.) is amended in section 207 by—

(a) striking all from "$672,000 for fiscal year 1982" through "1992, and";

(b) striking the period at the end; and

(c) inserting the following: "$1,500,000 for fiscal year 1994, $1,550,000 for fiscal year 1995, $1,600,000 for fiscal year 1996, $1,650,000 for fiscal year 1997, $1,700,000 for fiscal year 1998, and $1,750,000 for fiscal year 1999.".

SEC. 12. AMENDMENT TO PUBLIC LAW 102–587.

Section 3004 of Public Law 102–587 (106 Stat. 5067) is amended—

(1) in subsection (b) by striking "3(11) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(11))" and inserting in lieu thereof "3(12) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(12)"; and

(2) in subsection (b)(4) by striking "title III" within the quotation marks and inserting in lieu thereof "title IV".

NATIONAL MARINE FISHERIES SERVICE CHART OF REGISTERED COMMERCIAL FISHING VESSELS
(Submitted by Dr. Nancy Foster, National Marine Fisheries Service)

Currently, the National Marine Fisheries Service (NMFS) estimates that there are 183,849 commercial fishing vessels and/or commercial fishing operations in the United States and its territories. Of these, approximately 25,246 operate in Category I or II fisheries. Category I and II fisheries are those fisheries which have either a frequent or occasional interaction with marine mammals ($\geq$ one marine mammal interaction per 20 days). To date for 1993, NMFS has registered a total of 8,105 vessel owners. Since vessel owners may register for more than one fishery, NMFS considers the total number of registrants, by fishery, to be a better indicator of compliance with the Marine Mammal Protection Act Interim Exemption Program (MMEP). In 1993, NMFS has registered a total of 9,669 vessel owners, by fishery. Compliance with the MMEP has ranged from 91 percent in 1990 to 50 percent in 1992 (1993 data are incomplete).

Year	Estimated Total Number of Vessels in all U.S. Fisheries	Estimated Number of Vessels in Category I and II Fisheries	Total Number of MMEP Registrants	Total Number of MMEP Registrants, by Fishery
1990	180,136	21,859	15,756	19,790
1991	181,752	21,589	12,156	13,570
1992	183,302	24,705	11,310	12,449
1993*	183,849	25,246	8,105	9,669

* - As registrations are still being issued, these data reflect number of registrants as of July, 1993.

Estimated Total Number of Vessels in all U.S Fisheries - NMFS estimated the total number of vessels in all fisheries through a process which reveiwed current estimates of the number of State and Federal permits and licenses issued, the number of vessels operating in non-permitted fisheries (including charter boats), and the number of individual set nets, fish traps, pots, net pens and ponds, and bait pens.

Estimated Number of Vessels in Category I and II Fisheries - that subset of the total number of vessels that is required to register for an exemption certificate.

Total Number of MMEP Registrants - the actual number of individual MMEP registrants, keeping in mind that an exemption certificate may be issued to registrants that participate in more than one fishery.

Total Number of MMEP Registrants, by Fishery - the collective number of registrants, summed by fishery.

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STATEMENT ON BEHALF OF
THE MARINE MAMMAL COALITION
BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON ENVIRONMENT AND NATURAL RESOURCES
ON THE MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 1993

August 4, 1993

My name is John A. Hodges. I am a partner with the law firm of Wiley, Rein & Fielding in Washington, D.C. I am General Counsel of the Marine Mammal Coalition, a consortium of marine mammal public display and scientific research institutions.

The Marine Mammal Coalition appreciates this opportunity to present its position concerning H.R. 2760, the Marine Mammal Protection Act Amendments of 1993.

Congress should ensure that any legislation to govern the interaction between marine mammals and commercial fishing operations does not disturb the special regime for public display and scientific research under the MMPA. Proposed Section 118 of the MMPA, as added by Section 6 of H.R. 2760, is explicitly and properly limited to "govern[ing] the incidental taking of marine mammals in the course of commercial fishing operations." § 118(a)(1). The Section is clearly intended to avoid impacting the special regime for public display and scientific research.[1] At least three clarifying amendments, however, should be made to avoid any

---

[1] In the light of the limited scope of Section 118, we are concerned that the Marine Mammal Commission's statement before this Subcommittee on H.R. 2760 speaks as if that Section is broader. See, e.g., Statement of Robert J. Hoffman, Marine Mammal Commission, Aug. 4, 1993, at 3 ("It is also not clear from the Bill, as presently drafted, who would be responsible for allocating take among fisheries and other users when the total take, if not limited, would be greater than the Potential Biological Removal level") (emphasis added).

misunderstanding in this regard:

(1) Page 7, lines 16-17 should be amended to read along the following lines (additions underlined):

> "(F) a potential biological removal level for each stock in relation to incidental taking in commercial fishing operations and the factors used to calculate it."[2]

(2) Page 10, line 11 through page 11, line 2 should be amended to read along the following lines (additions underlined):

> "(3) The Secretary shall review information regarding the incidental taking of marine mammals under the general authorization and evaluate the effects of such incidental taking on the affected marine mammal stocks. Incidental lethal takes for each marine mammal stock shall not exceed the potential biological removal level established in the final stock assessment required under subsection (c). If the Secretary finds that the incidental taking of marine mammals in a fishery is likely to exceed the potential biological removal level, the Secretary shall immediately consult with the appropriate conservation team established under subsection (e), Regional Councils, and States, and prescribe emergency regulations to prevent the maximum extent practicable any further incidental taking in the fishery. Any emergency regulations prescribed under this paragraph shall --"

(3) Page 14, lines 8 through 11 should be amended to read along the following lines (additions underlined):

> "(A) Not later than 6 months after the date of the establishment of a conservation team, the team shall submit a draft conservation plan for the critical stock to the Secretary, which plan shall

---

[2] The Potential Biological Removal ("PBR") level must be adjusted downward to take into account non-fishery-related removals, including removals by public display and scientific research, which are not subject to the fisheries regime of Section 118.

meet the criteria of subsection (e)(4) of this section."[3]

* * *

It is essential that public display and scientific research not become embroiled in the regime relating to commercial fishing. In enacting the MMPA, Congress recognized the indispensable role of zoological institutions in raising public awareness of marine mammals and intended not to inhibit these institutions from obtaining the small number of animals they need for their beneficial purposes.[4]

---

[3] Subsection (e)(4) provides that the immediate goal of the conservation team is to advise the Secretary, through the development of a conservation plan, on methods of reducing lethal incidental takes of marine mammals below the potential biological removal levels established under subsection (c) as quickly as possible, and on methods of reducing incidental lethal takes to insignificant levels approaching zero within 10 years.

[4] Congress recognized the important role of public display institutions in relation to marine mammals as "resources of great international significance, esthetic and recreational as well as economic," 16 U.S.C. § 1361(6). During Congressional deliberations on the MMPA, Congressman Pryor said that "the intent of this basic legislation was not to deprive those particular institutions of bringing in a proper number of animals for the public use." Legislation on Preservation and Protection of Marine Mammals: Hearings before the Subcomm. on Fisheries & Wildlife Conservation of the House Comm. on Merchant Marine & Fisheries, 92d Cong., 1st Sess. 83 (1971). Senator Hollings stressed that without observing marine mammals in oceanaria the "magnificent interest" in marine mammals will be lost and "none will ever see them and none will care about them and they will be extinct." Ocean Mammal Legislation: Hearings Before the Subcomm. on Oceans & Atmosphere of the Senate Comm. on Commerce, 92d Cong., 2d Sess. 266 (1972). "[I]f it were not for these organizations and the public exposure you have on these animals in the first place, these matters wouldn't be brought to the attention of the public." Id. 555. Senator Cranston emphasized the "valuable educational service performed by these institutions." Id. 552-53. Senator Chiles stated that he gave "strong support towards recognizing the oceanarium exhibition industry in this legislation." Id. 164. Senator Gurney took note of the "advent of seaquariums and oceanariums" that have brought home "a much greater awareness of . . . ocean mammals." 118

Congress also recognized the important role of scientific research in relation to marine mammals.[5]

In recognition of the essential role that marine mammal public display and scientific research institutions play in carrying out the purposes and policies of the MMPA, Congress created a special, favorable provision for them under the MMPA. MMPA permits for public display and scientific research are a special exception to the Act's moratorium on taking and can be obtained pursuant to simplified requirements (16 U.S.C. § 1371(a)(1)). This regime for public display and scientific research is regime separate from the regimes applicable to other activities such as commercial fisheries (§ 1371(a)(2)), and periodic "waivers" (§ 1371(a)(3)(A)).

Congressional policy in favor of public display and scientific research was reiterated and reinforced in 1988, when Congress reauthorized the MMPA.[6]

Cong. Rec. S25291 (July 25, 1972). Senator Tunney anticipated "very little difficulty" for public display institutions as a result of the MMPA. Id. S25270.

[5] The MMPA recognizes that "there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully." 16 U.S.C. § 1361(3).

[6] Thus, the House Committee report on the 1988 Amendments stressed that

> "[e]ducation is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, recreational and economic significance. It is important, therefore, that public display permits be issued to entities that help inform the public about marine mammals, as well as perform other functions.
>
> . . .
>
> Permits may continue to be issued to public and privately owned zoological parks and oceanariums, as well as other qualifying institutions." H.R. Rep. No. 970, 100th Cong., 2d Sess. 33-34 (1988).

Similarly, the Senate Report stated that

In the 1988 MMPA reauthorization, Congress also enacted a separate amendment calling for a new regime to govern the incidental take of marine mammals in commercial fisheries after October 1993.[7] This 1988 amendment does not affect public display and scientific research.[8] Congress intended

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> "[e]ffective public display of marine mammals provides an opportunity to inform the public about the great aesthetic, recreational, and economic significance of marine mammals and their role in the marine ecosystem." S. Rep. No. 592, 100th Cong., 2d Sess. 29 (1988).

The Senate Report went on to say that

> "[t]he Committee recognizes that the recreational experience is an important component of public display and that public display has served a useful educational purpose, exposing tens of millions of people to marine mammals and thereby contributing to the awareness and commitment of the general public to protection of marine mammals and their environment." Id.

In the reauthorization, Congress also added enhancement of survival or recovery of a species or stock to the activities covered under Section 1371(a)(1), thus reaffirming that the items in this section are categories considered by Congress to be beneficial to marine mammals. Marine Mammal Protection Act Amendments of 1988, § 5(c), Pub. L. No. 100-711, 102 Stat. 4765 (1988).

[7] Marine Mammal Protection Act Amendments of 1988, § 2, P.L. 100-711, 102 Stat. 4755 (1988).

[8] No mention is made in Section 2 of the 1988 Amendments to taking for public display and scientific research. Section 2 is entitled "Interim Exemption for Commercial Fisheries." Public display and scientific research are covered separately -- in Section 5 of the 1988 Amendments, which is entitled "Scientific Research and Public Display Permits." The Committee Reports on the 1998 Amendments also make a clear separation of the provisions relating to commercial fishing operations and those relating to public display and scientific research. See H. Rep. No. 100-970, 100th Cong. 2d Sess. 13, 14, 27, 33-34 (1988); S. Rep. No. 100-592, 100th Cong. 2d Sess. 22, 28-30 (1988). The Reports also stress the importance of public display. See note 6, supra.

to have public display and scientific research continue to be governed separately as provided in Section 1371(a)(1).

The National Marine Fisheries Service has presented a proposal to Congress that could potentially eliminate the special regime for public display and scientific research. NMFS, Proposed Regime to Govern Interaction between Marine Mammals and Commercial Fishing Operations (Nov. 1992). If the Proposed Regime were to apply to public display and scientific research, these beneficial activities would for the first time be lumped into one regime with other activities, such as commercial fisheries. All would compete for the allocation of a number of animals permitted under a complex and disadvantageous PBR calculation. And, as acknowledged in the Draft Legislative Environmental Impact Statement on the Proposed Regime (at p. 2-46), the allocation of the marine mammals "will be a complicated and controversial process."

Instead, obtaining marine mammals for public display and scientific research institutions should continue to be governed pursuant to Section 1371(a)(1) and these institutions should be granted permits for their beneficial purposes expeditiously and with a minimum of burden.

To do otherwise would be contrary to the simplified requirements that have been called for by Congress for public display and scientific research, would strain public display and scientific research institutions, and would potentially thrust them into competition with other activities, such as commercial fishing. This would undermine the important public purposes Congress intended public display and scientific research institutions to serve. As stated by the Congressional Research Service,

> "This implicit policy difference [between public display and scientific research, on the one hand, and commercial fisheries, on the other] could be threatened if public display and scientific research takings are drawn into the same regime as commercial fisheries takings."[9]

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[9] Congressional Research Service, The Marine Mammal Protection Act: Reauthorization Issues at CRS-9 (Sept. 8, 1992).

The Proposed Regime appears inconsistent with respect to its relationship to public display and scientific research. In places it appears to say that public display and scientific research are not part of the Proposed Regime: "[t]his proposal addresses only those removals directly associated with commercial fishing activities" (Proposed Regime 67).[10] Elsewhere, however, it indicates that public display and scientific research are part of the Proposed Regime, namely, part of the allocation of the number of animals that the agency calculates pursuant to the PBR. (See Proposed Regime 62-63.) In addition, the related Final Legislative Environmental Impact Statement states that public display and scientific research will be subject to the PBR allocation process.[11] It bears note that the Conservation and Fishing Community Negotiated Proposal for a Marine Mammal Research and Conservation Program (at 3) indicates that the

---

[10] See also id. at 20:

"While NOAA believes that removals of marine mammals from all sources are controllable to some extent (i.e. removals resulting from subsistence users, tribal rights, recreational fishing, tanker traffic, public display, scientific research, pollution, commercial fishing and other causes of marine mammal takes), NOAA addresses only those removals that are directly associated with commercial fishing activities in this proposal. Removals that are a result of activities other than commercial fishing will be addressed when NOAA implements the new amendments to the MMPA."

[11] "Because the scope of the proposal reflects NOAA's belief that sound principles of wildlife management require that all human interactions be considered to ensure that marine mammals are not being disadvantaged, the total PBR of a stock would then be allocated among user groups (e.g., subsistence, public display, scientific research, and fishing)."

FLEIS at 7. See also id. at 20 ("This alternative also establishes an allocation scheme for distributing a PBR among fishery and non-fishery user groups").

Negotiated Proposal will not involve public display and scientific research.[12]

If public display and scientific research institutions were subjected to the Proposed Regime, they would -- out of necessity -- have to become involved in every step, from the proceedings on calculation of the PBR to allocation of the animals. This would embroil them in an onerous, divisive and paralyzing procedure at odds with the simplified regime intended for them under the MMPA. The impact upon the public display and scientific research communities would be enormous -- and indeed could be prohibitive -- despite the fact that reduction or elimination of the live takes for purposes of public display and scientific research would have no significant positive impact on the stock(s) in question.[13] Indeed, reduction or elimination of the take for these beneficial purposes would work against the interests of marine mammals. That public display and scientific research should not be subjected to the PBR regime has already been acknowledged by a variety of commenters.[14]

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[12] "Although there are instances where mortality from other sources is considered or account for, the negotiators did not intend with the proposal, to replace existing MMPA (or other statutory) regimes for regulating, prohibiting or permitting non-fishing takes of marine mammals. The process is aimed at reducing incidental lethal take rates of marine mammals in commercial fishing operations."

[13] The federal quotas have been extraordinarily conservative. For example, NMFS population studies show a healthy population of 35,000 to 45,000 bottlenose dolphins in the Gulf of Mexico. See Scott, G.P., D.M. Burn, L.J. Hansen, R.E. Owen, Estimates of Bottlenose Dolphin Abundance in the Gulf of Mexico from Regional Aerial Surveys, CRD-88/89-07, NMFS, Southeast Region. In contrast, there have been only 438 bottlenose dolphins taken for public display since the MMPA was enacted in 1972.

[14] The Marine Mammal Commission, for example, in its comments to NMFS has acknowledged the inappropriateness of using ABR (now termed PBR) as the basis for making allocations among various user groups and has acknowledged the need for special criteria for takes by the special user groups covered by 16 U.S.C. § 1371(a)(1). The Commission stated that it

"believes that it is ill-advised to try to use ABR determinations as the basis for allocating 'takes' among

---

various user groups. It is inappropriate, for example, to use ABR determinations as the basis for determining the number of animals that might fruitfully be taken to enhance the recovery of a depleted species or stock. Likewise, it makes little sense to use the same criteria to weigh the relative cost and benefits of taking for purposes of scientific research versus taking incidental to commercial fishing operations." (Comments at 53.)

The Commission concludes that "these proposals could unnecessarily impair scientific research and enhancement efforts." (Id.)

The Marine Mammal Center in its comments criticized the agency's original proposal:

"All that is left [under the ABR (now PBR) proposal] is fisheries, versus public display, scientific research and enhancement activities. There need be no controversy. To our knowledge there is no population with such a small take [sic] the commercial fishery cannot accommodate scientific research and public display. Commercial fishermen do not need to be in an annual battle with aquarium directors or university professors. There is no problem here. Just subtract this insignificant use from the ABR available to the fisheries. We are sure they would rather live with that than the annual battle this proposal envisions." (Emphasis added.)

Peter Tyack, Associate Scientist of the Woods Hole Oceanographic Institution, states:

"I am also concerned that the proposed allocation among user groups is not consonant with the MMPA's recognition that human activities which benefit marine mammals ought to have special treatment compared to activities that only harm marine mammals. That was the purpose of the permit program, to allow for research or public display, activities that would otherwise be prohibited. . . . I feel that the proposed regime will not implement the MMPA correctly unless it preferentially allocates potential takes to research, public display, and ecological enhancement or salvage efforts." (Emphasis added.)

He goes on to recommend: "Give priority for ABR to activities such as research and public display which benefit marine mammals." (Emphasis added.)

* * *

It is critical that the special regime for public display and scientific research not become entangled with the regime for commercial fishing operations. We look forward to working with Congress to help assure that this important goal is achieved.

The Center for Whale Research in its comments states that

"we disagree with the concept of introducing a NOAA determined total allowable removal (ABR) level governing removals incidental to commercial fisheries and other activities (eg: public display and research) to allocate annually among user groups. In practice this would mask the lethal removals in commercial fishing with nonlethal 'takes' by harassment, research and public display."

The Center concludes that the regime should focus on commercial fisheries "and not obfuscate the issue by allocation, permit process and accounting for non-fishing takes by other users [e.g. research and public display]."

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FISHERIES MANAGEMENT

Congress of the United States
House of Representatives
Washington, DC 20515

August 19, 1993

The Honorable Gerry Studds
Chairman
Committee On Merchant Marine and Fisheries
Subcommittee On Environment and Natural Resources
1334 Longworth HOB
Washington, D.C. 20515

Dear Chairman Studds:

I would like to submit the enclosed questions for the record for the August 4, 1993 Subcommittee on Environment and Natural Resources hearing on H.R. 2760, the Marine Mammal Protection Act Amendments of 1993.

Best regards,

Dan Hamburg
Member of Congress

DH:mbb

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Questions from Representative Dan Hamburg
Subcommittee on Environment and Natural Resources
August 4, 1993 Hearing on H.R. 2760
Marine Mammal Protection Act Amendments of 1993

For Dr. Nancy Foster, Robert Hofman, Suzanne Iudicello, Sharon Young

I realize that jurisdiction for sea otters falls under U.S. Fish and Wildlife Service. However, I would like to hear whatever answers any of you could offer to the following questions.

1) Do you think that the provisions in H.R. 2760 will adequately address the resource competition problems between the shellfish fisheries of California and the California Sea Otter? If not, do you have any suggestions about how the problem could be resolved?

2) Under H.R 2760, the Endangered Species Act and P.L. 99-625 would govern the incidental taking of California sea otters during commercial fishing operations. If at some future time the California Sea Otter is delisted, and is no longer covered under the ESA, would P.L. 99-625 be sufficient to govern this taking?

3) What are the implications for the shellfish fisheries of California should the U.S. Fish and Wildlife Service abandon the San Nicholas Island sea otter translocation and the "no sea otter" management zone established by P.L. 99-625 especially if the sea otter is delisted at a future time?

All witnesses

Should H.R. 2760 specifically prohibit intentional shooting of marine mammals?

Many witnesses commented on the provisions in H.R. 2760 to establish the Pinniped Interaction Task Force. Would anyone like to comment further on:

1) the adequacy of these provisions to address interactions of commercial fishermen, fisheries and pinnipeds;
2) the need for a Pinniped Interaction Task Force;
3) the need for more specifics in setting up the Task Force such as a more detailed definition of the types of interactions to be addressed;
4) whether the Task Force should address interactions with

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fisheries other than salmonid fisheries;
5) what kind of research is needed to ascertain the extent of the impact of pinnipeds feeding on salmonids as compared to the impacts of commercial fishing harvest on these fish;
6) whether adequate support has been given to commercial fishermen in the development and proper use of non-lethal means of deterrents;
7) whether the Pinniped Interaction Task Force should include monitoring on the extent of direct interactions at sea;
8) whether there are any circumstances under which intentional lethal takes of pinnipeds should be allowed.

MARINE MAMMAL COMMISSION
1825 CONNECTICUT AVENUE, N.W. #512
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10 September 1993

Ms. Lesli Gray
Subcommittee on Environment and
Natural Resources
Ford House Office Building, Room 545
Washington, DC 20515

Dear Ms. Gray:

I herewith enclose responses to the questions forwarded with Mr. Studds' letter of 24 August for inclusion in the record of the 4 August 1993 hearing on H.R. 2760, the Marine Mammal Protection Act Amendments of 1993. If you or others have questions about the responses, I would be happy to answer them.

Sincerely,

Robert J. Hofman, Ph.D.
Scientific Program Director

Enclosure

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1) Do you think that the provisions in H.R. 2760 will adequately address the resource competition problems between the shellfish fisheries of California and the California Sea Otter? If not, do you have any suggestions about how the problem could be resolved?

H.R. 2760 provides that the provisions of the Endangered Species Act of 1973 and P.L. 99-625, and not the provisions of the bill, would govern the incidental taking of California sea otters during the course of commercial fishing operations. P.L. 99-625 provided authority to the Fish and Wildlife Service to (a) capture and translocate sea otters from the parent population in California to establish an experimental population at San Nicolas Island; and (b) using non-lethal means, prevent sea otters from expanding their range in California to the other Channel Islands or mainland areas south of Point Conception.

P.L. 99-625 does not authorize preventing or limiting reoccupation of areas historically occupied by sea otters north of their current range in California. Thus, as long as it remains in effect, P.L. 99-625 requires that the Fish and Wildlife Service prevent sea otters from reoccupying their historic range south of Point Conception, but does not limit or provide authority for limiting expansion northward. Further, if the establishment of the experimental sea otter colony at San Nicolas Island is determined not to have been successful, there no longer would be a requirement, under P.L. 99-625, to prevent range expansion south of Point Conception.

Sea otters eat abalone, sea urchins, and other shellfish. The best available information indicates that, prior to their extirpation by commercial hunting in the last century, sea otters limited the numbers of abalone, sea urchins, and other shellfish wherever they were able to feed effectively. Thus, the removal of sea otters allowed the growth of abalone, sea urchin, and other shellfish populations which, in turn, allowed the development of commercial fisheries for these sea otter prey species. If sea otters are allowed to reoccupy their historic range in California, they likely will reduce populations of abalones, sea urchins, and other prey species to their pre-sea otter exploitation levels, and thereby preclude commercial fisheries for these species. Reduction of sea urchin populations is likely to enhance kelp growth in some areas and enhance finfish populations and fisheries.

Under the Marine Mammal Protection Act as presently written, taking of marine mammals is prohibited, except for certain limited purposes, such as scientific research and enhancement, if the affected population is not at its optimum sustainable level.

The National Marine Fisheries Service has defined the term "optimum sustainable population" as --

> "...a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity. Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality" (50 C.F.R. 216.3).

Before they were extirpated by commercial hunting, sea otters presumably inhabited most of the nearshore coastal waters of California. Although habitat in some places, like San Diego and San Francisco Bays, may no longer be suitable for sea otters, there can be little doubt that (a) much of the presently unoccupied historic sea otter range in California remains suitable sea otter habitat; (b) less than one-half and possibly less than one-third, of the available sea otter habitat in California presently is occupied; and (c) the sea otter population in California presently is below the lower limit of its optimum sustainable population range as defined above. Thus, nothing can be done to prevent or limit range expansion northward until the population is determined to be within its optimum sustainable range or Congress provides authority to do so, either in the Marine Mammal Protection Act, the Endangered Species Act, or free-standing legislation such as P.L. 99-625.

Available information suggests that, historically, a large part of the California sea otter population occurred in San Francisco Bay. Because of pollution, sedimentation, increased boat traffic, etc., much of the historic sea otter habitat in the Bay probably has been damaged or destroyed. In some areas, it may be possible to restore and maintain suitable sea otter habitat in the Bay. If sufficient habitat is available, or can be made available through habitat restoration, it may be that the nearshore coastal area from Point Conception north to, and including, San Francisco Bay would support a population at or above the maximum net productivity level, calculated with respect to the largest population supportable by presently available habitat in the State. Thus, before doing anything else, it might be desirable to ask [direct] the Fish and Wildlife Service to undertake a study, in consultation with the California Department of Fish and Game, to determine the amount of suitable and potentially suitable sea otter habitat present in San Francisco Bay and whether reoccupation of this habitat, at equilibrium levels, would bring the California sea otter population within its optimum sustainable population range.

2) Under H.R. 2760, the Endangered Species Act and P.L. 99-625 would govern the incidental taking of California sea otters during commercial fishing operations. If at some future time the California Sea Otter is delisted, and is no longer covered under the ESA, would P.L. 99-625 be sufficient to govern this taking?

It is questionable whether P.L. 99-625 would provide adequate authority to govern incidental taking in commercial fisheries if the California sea otter population was not listed under the Endangered Species Act. This uncertainty could be overcome by changing proposed section 118(a)(4) of H.R. 2760 to read something like --

> "(4) The provisions of the Endangered Species Act of 1973 and P.L. 99-625 and not this section shall govern the incidental taking of California sea otters during the course of commercial fishing operations, until such time as the California sea otter population is removed from the List of Endangered and Threatened Wildlife."

3) What are the implications for the shellfish fisheries of California should the U.S. Fish and Wildlife Service abandon the San Nicolas Island sea otter translocation and the "no sea otter" management zone established by P.L. 99-625 especially if the sea otter is delisted at a future time?

If the San Nicolas Island translocation is abandoned (determined to be a failure), the Fish and Wildlife Service would be required to use all feasible, non-lethal means to capture any animals remaining at San Nicolas Island and in the management zone, and to return those animals to the parent population. After this is done, management authority would revert to the provisions of the Endangered Species Act and the Marine Mammal Protection Act. Under the Marine Mammal Protection Act, taking from depleted species can be authorized only for purposes of enhancement and scientific research, and incidental to activities other than commercial fishing when the taking involves only small numbers and would have negligible effects. As noted in the response to question 1 above, taking to limit range expansion, south as well as north, would be prohibited until such time as the population is found to be within its optimum sustainable population range, or Congress authorizes taking to limit range expansion as it did in P.L. 99-625.

Should H.R. 2760 specifically prohibit intentional shooting of marine mammals?

At present, the Marine Mammal Protection Act prohibits intentionally shooting marine mammals, except (a) by Alaska

Natives for subsistence and handicraft purposes; (b) by local, state, or Federal officials to protect the public health and welfare, or to end the suffering of a sick or injured animal; (c) for purposes of scientific research authorized by a permit issued by the Secretary of the Interior or Commerce; (d) by commercial fishermen to protect themselves, their gear, or their catch; and (e) as authorized by a waiver of the Act's moratorium on taking.

In some areas, substantial numbers of marine mammals, particularly pinnipeds, are being found washed up dead on beaches, apparently after being shot offshore. There also are other indications of marine mammals being shot -- e.g., apparent bullet holes in the dorsal fins of killer whales. Under the interim exemption program, shooting of cetaceans and depleted species is prohibited and fishermen are required to report all taking of marine mammals, intentional as well as accidental. The number of marine mammals which fishermen report shooting is substantially less than the number of animals being found dead, or seen with apparent gunshot wounds. This suggests that at least some fishermen are not complying with the reporting requirements, and/or that fishermen or others are shooting marine mammals illegally. In either case, there clearly is an enforcement problem.

The negotiated proposal submitted by representatives of the U.S. fishing industry and environmental community recognizes this problem, and recommends prohibiting fishermen from intentionally shooting marine mammals. Such a categorical prohibition would be easier to enforce than the present provision which allows fishermen to shoot marine mammals to protect themselves, their gear, or their catch. It should be recognized, however, that such a provision likely would not prevent or substantially reduce intentional shooting by fishermen or others, unless a greater effort is made to identify and prosecute those who violate the prohibition.

Questions regarding section 7 of H.R. 2760 -- establishment of a Pinniped Interaction Task Force.

It is not clear, either in H.R. 2760 or in the negotiated proposal submitted by representatives of the fishing industry and environmental community, precisely what purpose or purposes the proposed Pinniped Interaction Task Force is intended to serve. As we understand the proposed amendment, the Task Force would serve an advisory function. Any directed taking recommended by the Task Force would have to be authorized in accordance with section 101(a)(3)(A) and section 103 of the Act. This being the case, it would appear that the proposed Task Force offers nothing that cannot be achieved through the Act's waiver process as it presently exists.

If the intent is to circumvent the waiver process and to permit taking, in certain circumstances, from species and population stocks that have not been found to be within their optimum sustainable population range, at the very least the bill should be expanded to specify the circumstances where the Secretaries would be able to permit taking not otherwise authorized by the Act, and the procedure whereby the authorization to take would be provided. Also, consideration should be given to specifying that monitoring programs must be undertaken, as necessary to ensure that the authorized taking does not have unanticipated effects.

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September 10, 1993

The Honorable Gerry Studds
Chairman
House Committee on Merchant Marine and
Fisheries
Rm 545, Ford House Office Bldg.
Washington, D.C. 20515

(Attn: Ms Lesli Gray)

Dear Chairman Studds:

This is in response to your questions concerning the Marine Mammal Protection Act Amendments of 1993, dated August 24, 1993, and addressed to all witnesses. While I testified on behalf of the Gulf of Alaska Coalition at the hearing, I also represent the Pacific States Marine Fisheries Commission on issues relating to broader pinniped interactions on the West Coast. In that capacity, I would like to respond to your questions for the record.

The Commission strongly supports the creation of pinniped interaction task forces to address problems associated pinnipeds which exhibit dangerous or damaging behavior. In certain situations, intentional lethal removal of pinnipeds may be the only effective method of further avoiding the harm being caused. During the negotiation between the environmental and fishing communities over the proposal to regulate fishery/marine mammal interactions, we continued to argue for a statutory mechanism to be included in the MMPA to respond to the damage being caused by California sea lions and Pacific harbor seals in Puget Sound and other areas of the West Coast.

On June 15, 1993 a number of organizations came to a

conceptual agreement on a process for the Secretary of Commerce to use in deciding what, if any, management measures to adopt to respond to pinnipeds which were identified as habitually exhibiting dangerous or damaging behavior that cannot otherwise be deterred. These organizations were the Alaska Groundfish Data Bank, Aleutians East Borough, Animal Protection Institute, Center for Marine Conservation, Concerned Area M, Gulf of Alaska Coalition, Kodiak Island Borough, National Fisheries Institute, Northwest Indian Fisheries Commission, Pacific States Marine Fisheries Commission, Peninsula Marketing Association, The Marine Mammal Center, and Trout Unlimited. Attached is a copy of the June 15 agreement for the record.

These organizations agreed that a process should be established which would assist the Secretary in determining whether to implement recommendations to lethally remove habitual offenders, develop non-lethal methods of deterrence, or take no action. While these organizations agreed on a process, it is fair to say that there were wildly divergent views within the groups about whether lethal removals would be appropriate in specific circumstances.

In recognition of the general agreement on process and diversity of views on remedy, the Commission specifically responds to your eight questions:

Question 1: This question involves two types of interactions. The first interaction involves the predation of robust marine mammal stocks on fish populations per se, such that the fish populations are in jeopardy of dramatic diminution or extinction. This type of interaction is best represented by the wild steelhead run being threatened by California sea lions at the Ballard Locks in the Lake Washington river system of Seattle, and California sea lion and harbor seal predation in the Columbia River system. The second type of interaction involves the harm being caused to the commercial and recreational fishing industry by roving marine mammals. This is best represented by the problems being experienced by sport trollers in the Puget Sound, Tillamook Bay, and off the coast of San Diego.

Section 7 of H.R. 2760 as currently drafted does not adequately address either type of interaction. Section 7 would form a task force with the authority to offer advice to the Secretary, but would not grant the Secretary with the authority to permit lethal removal when such a management measure becomes necessary.

Question 2: There are three options for addressing nuisance pinnipeds. The first option is to do nothing, and allow the harm to continue. The second option is to provide the Secretary of Commerce with the authority to

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lethally remove nuisance pinnipeds. The third option is to create a regional task force to address contentious issues involving nuisance animal management and advise the Secretary on the most appropriate management measures to be taken, based on the specific facts and circumstances of the interaction.

The Commission believes that the Congress should endorse the third option. The status quo would serve only to heighten and inflame the frustration on the West Coast over the apparent inability of the Federal Government to respond to the harms being caused by nuisance animals. Pinniped interaction task forces are necessary to address these problem interactions because they create a regional forum for consensus-building among diverse interest groups. Many interested parties view centralized decision-making in Washington, D.C. as too removed and aloof to meaningfully respond to growing tensions in the region. The regional task force approach is a fair compromise between the status quo and centralized decision-making. The Secretary of Commerce must, of course, be given the legal authority to implement the recommendations of a task force in order for such a process to be meaningful.

Questions 3 and 4: Any task force formed should be given the authority to address all types of interactions, provided such interactions are determined to be dangerous or damaging. The scope of the task force should not be limited to addressing problems relating only to salmonid species. The emphasis should instead be on whether the pinniped in question has been identified as a habitual offender. Once the Secretary, in consultation with a task force, determines that non-lethal methods of deterrence are not effective, the Secretary should be authorized to lethally remove habitual offenders to the extent that such interaction is considered dangerous or damaging. Such interactions could include potential threats to other species in the marine ecosystem including, but not limited to, salmonid species.

Any system established should be designed to function smoothly and expeditiously. The procedural requirements should not be so onerous that the task force loses its power to resolve highly contentious issues in a reasonable timeframe.

Question 5: We are not sure what this question is meant to address, but it seems to solicit a response on whether efforts should be made to do a comparative analysis of the marine mammal "harvest" of salmonids and the commercial harvest of salmonids. If conducted, this type

of comparative analysis would lead to ridiculous discussions. Unlike fishermen, marine mammal harvests of salmon are not controllable through time and area closures. What if the mammal stocks dramatically increase in an area and exceed their share? Is the Congress prepared to authorize widespread culling in order to reduce the population back to a size which would correspond with its share of the salmon harvest?

We would recommend that the debate over the MMPA not be distracted by arguments over the proper share of commercial fish quotas for marine mammals. Congress is not yet prepared to treat marine mammals as harshly as it is commercial fishermen. Instead, the focus should be on measures to respond to nuisance animals which threaten salmonid and other marine species. These interactions occur, irrespective of general harvest levels by commercial fishermen or the percentage of the fishery biomass consumed by marine mammals. The Ballard Locks is the most pressing situation, but there are other interactions in the West Coast which should be addressed over time as well.

Question 6: The Commission strongly believes that no support has been given the commercial fishing industry to deter marine mammals. The Commission is a signatory to draft legislation submitted to you under separate cover which authorizes the non-lethal deterrence of marine mammals by commercial and recreational fishermen to protect gear and catch. We believe that the National Marine Fisheries Service should be encouraged to work with fishermen to find better methods of deterring animals from the gear. The authority to non-lethally deter marine mammals does not, however, respond to the problems being caused by habitual offenders.

Question 7: The question confuses the issue of nuisance animals with the issue of the interactions between commercial and recreational fishermen and robust mammal stocks on the West Coast. Any task force process should address only the nuisance animal interactions, such as the Ballard Locks. The problems caused by robust populations must be dealt with more generally, using broader principles of wildlife management. Provisions for the monitoring the interactions between commercial fishermen and marine mammals should be addressed separately as part of the debate over proposed Section 118. We have submitted our views, both conceptually and in draft bill language, to you under separate cover.

Question 8: By our response to the other questions, it is clear that the Commission believes that the

intentional lethal removal of pinnipeds should be available to Federal and State wildlife managers when the animals are dangerous or are causing undue damage to other marine resources. We believe that lethal removal may not be appropriate for marine mammals listed as endangered or threatened under the Endangered Species Act, designated depleted under the MMPA, or identified by the Secretary as a "critical stock" under the proposed MMPA §118 conservation program submitted to you under separate cover.

That concludes our response to the issue of whether to form task forces to manage pinnipeds identified as habitually exhibiting dangerous or damaging behavior that cannot otherwise be deterred. For the record, the Commission would briefly like to comment on a number of problems that the task force process, as proposed, may not effectively handle. It is with respect to these areas where the Commission radically departs from the views of many environmental organizations, such as the Center for Marine Conservation or the Marine Mammal Center.

First, the pinniped task force process set forth in the attachment does not adequately respond to the key structural defect in the MMPA, that is, the use of "optimum sustainable population" as the scientific measure of the health of a particular marine mammal population.

The increasing abundance of marine mammals on the West Coast is causing serious problems which must be resolved if the MMPA is to maintain its popular support in coastal regions. Examples include:

- Sport charter boats have been forced to abandon traditional fishing grounds because California sea lions take more fish from the lines than clients can reel in.

- Docks are overrun by lounging animals, even to the point of damaging facilities such as the new floating pier at Charleston, Oregon.

- Recreational fishermen in bays of southwest Washington lose up to 60 percent of troll-hooked fish to harbor seals, yet they are prohibited by law from using non-lethal deterrents.

- In Bellingham Bay drift gillnet and set net fishermen are losing 30 to 50 percent of their fall chinook salmon catch to harbor seals.

- Sea lions feed on precious wild stocks of steelhead and chum salmon 40 miles up the Nisqually River.

- Scientists on the Recovery Team for the threatened and endangered Columbia River salmon now ask if the hoards of harbor seals at the mouth of the Columbia are impacting these critical runs. Anthropologist Franz Boas, who did ground breaking fieldwork among Native Americans of the Northwest Coast in the late 19th Century witnessed "drives to capture and harpoon sea lions down to the sea". The purpose of such seal drives was to prevent these aquatic carnivores from interfering with Indian fishing efforts during the annual salmon runs, which were their primary source of food.

- Beginning in 1991 urban sport fishermen began to interact with California sea lions 26 miles up the Willamette River, a tributary of the Columbia River and about 125 miles upstream from the ocean.

- In 1990, NMFS scientists documented that an estimated 40 to 50 percent of the observed adult spring chinook salmon ascending the fish ladder at Lower Granite Dam (Columbia River) had teeth marks and scars caused by either harbor seals or California or California sea lions. The number of fish that did not escape their predators is not known.

- Harbor seal numbers are so dense in southern Puget Sound that their feces have contaminated shellfish growing beds. The Washington Department of Health has been forced to close sites in Dosewallips State Park to shellfish harvesting for the protection of the public health.

- California nearshore gillnet fisheries for halibut and sea bass suffer up to 80 percent loss of catch in some areas during certain seasons, as harbor seals strip fish from nets.

- In California, and increasingly in Washington, sea otters are eliminating harvestable shellfish resources upon which people also rely (clams, crabs, abalone, and sea urchins). Without long-term zonal management (zones for otters and zones for people) the West Coast will find itself without shellfish fisheries (The sea urchin fishery in California alone is an $80 million export to Japan).

- At the mouth of the Elwha River in the Strait of Juan de Fuca, tribal gillnet and set net fishermen have lost 30-50 percent of their fall chinook catch to harbor seals. Also, non-Indian sport fishermen report big populations of harbor seals taking large chinook from their lines.

These and other problems will not be resolved by the proposed pinniped task force because they involve roving bands of animals that are not easily identified, not located in a fixed geographic location, and too numerous for the process set forth for the task force. The task force is designed to respond only to individual pinnipeds which have been scientifically identified, and for which information is available that indicates their damaging behavior has become habitual. The task force approach would take one or more years of evaluation or decision-making before wildlife managers are authorized to lethally remove the animals. It does not give wildlife managers the flexibility to use non-lethal or lethal means to respond in a timely manner to migrating groups of animals which are damaging other resources in the marine ecosystem.

The only viable solution is for a waiver of the taking moratorium and a resumption of management activities by Federal, State, Tribal, or other eligible wildlife management authority. A legislative declaration that California sea lions and harbor seals on the West Coast are at their optimum sustainable populations is necessary in order to break the impasse and move into a constructive dialogue on how to fashion a reasonable management regime.

The statutory definition of optimum sustainable population, 16 U.S.C. 1362(6), is "the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element". NMFS has attempted to balance the competing portions of this definition, but has met with little success. While choosing to base OSP determinations on "maximum productivity", as required by law, NMFS has not been able to effectively balance the effects of robust mammal populations on the health of the ecosystem. The present system for OSP determinations does not work because it relies too heavily on productive rates while ignoring population size impact on other constituent elements of the marine ecosystem.

One option is to do nothing and allow the status quo to continue. The Acting Director of NMFS has acknowledged that the agency would not be able to even make an OSP determination for five to ten years. If the reproductive rates are high at that time, the conclusion of the agency would likely conclude that the California sea lion and harbor seal stocks are below OSP. During the five to ten year period, the populations will continue to explode along the West Coast, and their impact on other marine resources will grow proportionally.

Another option is to attempt to redefine OSP, stressing the need to restore the balance between the maximum productivity goal and health of the ecosystem. This debate would be long and drawn out.

The third option is to test the fundamental structure of the MMPA as currently drafted by defining these two marine mammal stocks at OSP. A legislative OSP declaration would in effect be a statement that the Congress considers the populations to be of sufficient health to permit the initiation of a dialogue between the Federal, State, and Tribal Governments on the appropriate scope of management measures to utilize when these marine mammals are causing serious problems. The Congress has at its disposal sufficient information to make a common sense determination about the health of these two animal stocks. Designating animals at OSP paves the way for the appropriate wildlife managers to begin to respond to serious problems or crises caused by marine mammals. If such a dialogue produces concrete results, the fundamental structure of the MMPA is reinforced as an effective conservation and management tool. By designating these two stocks at OSP, the West Coast becomes a testing ground to define the scope of management measures and their underlying effectiveness in responding to identified problems."

Without an OSP determination, there is no management authority to deal with robust marine mammal stocks. The scientists have stated categorically that a positive OSP determination for harbor seals and California sea lions is out of the question for at least five to ten years, a view confirmed by Dr. Nancy Foster during the August 4 hearing. The pinniped task force, as currently discussed, would not resolve this Catch-22 and provide the basis for wildlife management of these robust stocks.

The second issue involves the effectiveness of a pinniped task force to respond to the problems facing the wild steelhead run on Lake Washington remains uncertain. The sea lion predation problem on Lake Washington wild steelhead is approaching the crisis point. An escapement goal of 1,600 wild steelhead is required to sustain the run. In 1987-88, 2,274 winter-run steelhead returned to Lake Washington. During that period sea lions killed 1178 fish, roughly 52% of the winter run. In 1988-89, the sea lions killed roughly 65% of the winter run. The next three years (1989-90, 1990-91, and 1991-92) found 50-60% of the winter run decimated by less than five sea lions on the Lower Ship Canal. After conducting surveys of the 1992-93 run on the Lake Washington river system, biologists found the escapement to number less than 150 fish. This is the situation facing the winter run steelhead stock at Lower Ship Canal and the Ballard Locks.

If legislative authority to remove these problem animals is not in place by December, 1993, the sea lion predation would result in the dramatic diminution of the ability to restore this run over time. Under the worst case, the run may be facing extinction in the short-term. The Congress must keep this short timeframe in mind during the consideration of the MMPA reauthorization this Fall. The Congress should consider special legislation specifically addressing the Ballard Locks if the objective remains

to take pressure off the wild run steelhead being caused by sea lion predation.

The Pacific States Marine Fisheries Commission appreciates this opportunity to submit additional comments for the record. Please feel free to request further information from us at any time.

Sincerely,

Brad Gilman

Brad Gilman
Washington Counsel
Pacific States Marine Fisheries Commission

Center for Marine Conservation

September 13, 1993

The Honorable Gerry Studds
Chairman
U.S. House of Representatives
Committee on Merchant Marine and Fisheries
Room 1334 Longworth House Office Building
Washington, D.C. 20515-6230

Dear Mr. Chairman:

Thank you again for the opportunity to present our views on the Marine Mammal Protection Act Amendments of 1993, and to add to the record of the Subcommittee hearing on August 4.

Your introduction today, with Mr. Young and Mr. Saxton, of a bill to extend for six months the Interim Exemption Period for incidental take in commercial fishing will give all interested parties the opportunity to work with you and the Committee to further refine the approach of your legislation and to work out any differences that remain among the various points of view. We look forward to participating in that process and offering any necessary assistance to you and your staff.

With regard to the questions from Representative Dan Hamburg, our responses are as follows:

Do you think that the provisions in H.R. 2760 will adequately address the resource competition problems between the shellfish fisheries of California and the California Sea Otter? If not, do you have any suggestions about how the problem could be resolved?

Yes, we believe that H.R. 2760 will adequately address resource competition problems between shellfish fisheries of California and the California sea otter. The intent behind H.R. 2760, and its provisions that preserve the *status quo* for sea otters in California, is to keep intact the sea otter protection program established under Public Law 99-625, which was premised on the need to establish zones to protect both sea otters and shellfish resources. Representatives of the California shellfish industry asserted during meetings of the environmental community/fishing industry working group that they desired to preserve the approach established in public law 99-625. At the current time, environmental organizations, including the California-based Friends of the Sea Otter, are comfortable with that approach as well. Accordingly, we see no need for further action at this time.

Under H.R. 2760, the Endangered Species Act and P.L. 99-625 would govern the incidental taking of California sea otters during

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commercial fishing operations. If at some future time the California Sea Otter is delisted, and is no longer covered under the ESA, would P.L. 99-625 be sufficient to govern this taking?

Yes, public law 99-625 is freestanding legislation and does not serve as an amendment tot he Endangered Species Act. Thus, should the sea otter be delisted, the provision s of 99-625 would remain in effect.

What are the implications for the shellfish fisheries of California should the U.S. Fish and Wildlife Service abandon the San Nicholas Island sea otter translocation and the "no sea otter" management zone established by P.L. 99-625 especially if the sea otter is delisted at a future time?

If the sea otter translocation is abandoned, the provisions of public law 99-625 would no longer apply. Thus, the provisions of existing and otherwise applicable law, such as the Endangered Species Act and the Marine Mammal Protection Act, would control conflicts between shellfish fisheries and sea otters. If the sea otter is delisted under the Endangered Species Act, then the provisions of the Marine Mammal Protection Act would continue to apply. In the unlikely event that conflicts would develop between shellfish fisheries and sea otter population growth under such a scenario, then the traditional tools available to manage such conflicts under the MMPA would apply. Incidental take would be regulated under whatever regime is established by Congress pursuant to the ongoing deliberations. Directed take would be prohibited unless authorized pursuant to the existing provisions of the MMPA for allowing permits and waivers of the moratorium for such purposes.

Should H.R. 2760 specifically prohibit intentional shooting of marine mammals?

Yes. Despite the continued prohibition on intentional killing except where all non-injurious deterrence methods had been tried and were insufficient to protect gear or catch, marine mammal shootings increased during the period. According to The Marine Mammal Center, more marine mammals stranded with bullet wounds in 1992 than in the prior eight years combined. In a half dozen fisheries in 1990 and 1991, more marine mammals were killed by "deterrence" actions than by interactions with gear. The narrow lethal deterrence exception in the MMPA has been relied upon by some in the fishing industry as an open invitation to "cull" marine mammals because they are perceived as competitors with fishermen. The claim that certain populations of marine mammals are so abundant that they should be winnowed is a false one. Recent stock assessments indicate that harbor seals in Puget Sound, accused of reproducing too much, stealing fish, and polluting beaches, may in fact have begun to *experience declines of the sort that could be a precursor to events similar to those that appeared before the crash of harbor seals in Alaska.* We believe it is foolhardy to wait until the stock is a candidate for listing as depleted before we

take action to minimize human-caused mortality of all types, including shooting. In any case, whether shooting is the cause of population declines seems to us beside the point. The fishing community agreed in our discussions to stop the practice. It flies in the face of the underlying policies of the MMPA. Why not state so outright in the law?

Many witnesses commented on the provisions in H.R. 2760 to establish the Pinniped Interaction Task Force. Would anyone like to comment further?

Rather than comment individually on each of the listed questions, we enclose for your consideration a copy of proposed language that we believe would be acceptable in devising such a task force. Of greatest importance in any such endeavor are the following elements:
1) demonstrated, documented and habitual damaging behavior exhibited by an animal or animals that can be identified individually;
2) a process that requires the proponent of action to demonstrate that the applicant has proven that the marine mammal is the cause of the problem, that the applicant has taken all possible steps to remedy the situation, and none were successful;
3) that the chosen course of action will indeed correct the problem, not just put it off to another year.

We point out for the record that while members of the conservation community were willing to agree to a process to examine problem interactions between pinnipeds and fishing situations such as locks, dams, net pens and so forth, we did not agree that following such a case-by-case review that we would agree to lethal removal of an animal. Each applicant will have to make his/her case through a rigorous process.

Again, thank you for providing this additional opportunity to amplify the above points for the record. We look forward to continuing to work with you and the Committee as you continue your deliberations on this important marine conservation law.

Sincerely,

Suzanne Iudicello

Suzanne Iudicello
Senior Program Counsel

cc: The Honorable Dan Hamburg, U.S. Representative

INTERNATIONAL WILDLIFE COALITION

The following represents the response of the International Wildlife Coalition to questions posed by Representative Dan Hamburg subsequent to the August 4, 1993 hearing before the House Subcommittee on Natural Resources and the Environment.

Questions Pertaining to Sea Otters and H.R. 2760

1. Resource competition.

H.R 2760 does not specifically address resource competition. Because the Marine Mammal Protection Act (MMPA) is designed to protect and recover depleted marine mammal populations, fishery issues are secondary to concerns about recovery. As regards management of sea otters and fishery conflicts, the bill defaults to P.L. 99-625.

A corollary of this question is how conflicts can be addressed. The proposals of the Marine Mammal Protection Coalition contain a provision to fund a program of gear and technology research to find means of reducing marine mammal interactions with fisheries. If HR 2760 is amended to require such a program, we would support extending its function to seeking reasonable solutions to conflicts between commercial interests and sea otter recovery.

2. The relationship of H.R. 2760, the Endangered Species Act (ESA) and P.L. 99-625 in the event of sea otter de-listing.

It is our understanding that P.L. 99-625 may become moot before sea otters ever recover to such an extent that de-listing them becomes an issue. The October meeting of the sea otter recovery team will discuss recommendations. We believe that if the otter is de-listed while P.L. 99-625 exists, then 99-625 would have precedence, but only within the management zone.

We would also like to point out that when otters are eventually de-listed under the ESA, provisions of the MMPA still apply. Even if sea otters are no longer considered threatened, they may still be considered depleted under the MMPA. As such, they would be managed to assure recovery to Optimum Sustainable Populations (OSP). This would demand a very small Potential Biological Removal (PBR), and would seriously curtail any possibility of incidental takings. Currently the MMPA relies on historic carrying capacity to determine numbers for OSP. Provisions of H.R. 2760 would change this to a reliance on current carrying capacity to make OSP decisions. It is not clear what effect this change would have on determining OSP for otters.

3. Implications of the abandonment of translocation and the "no sea otter" management zone.

It is generally accepted that commercial levels of shellfish takes cannot be supported within areas that also have significant sea otter populations. Both otters and humans are exceptionally competent foragers, and resources are limited. If zonal management is terminated, and large stable numbers of sea otters occupy shellfish grounds used by commercial harvesters, the fishery is likely to be significantly damaged or even collapsed. Both the ESA and the MMPA mandate that recovery receive priority over commercial interests. In order to reach OSP under the MMPA, sea otters will require greater range either to the north or south of their current

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range, but not necessarily both. Studies done by U.S. Fish and Wildlife Service do not indicate that recovery will require expansion throughout the entire length of California's coastline. The direction in which expansion is encouraged will determine the effect on commercial fisheries. Shell fishery interests from Pt. Conception south could be safeguarded if otters are encouraged to expand to north coast habitat. Alternatively, north coast fisheries could be safeguarded if sea otter expansion is allowed to the south of Pt. Conception. It is necessary to allow otter populations to expand their range if they are to recover to pre-exploitation numbers, as is mandated by the ESA and the MMPA. However, once recovery has been achieved, decisions will have to be made about what parts of the coast are "saved" for sea otters and what parts for fisheries and how this is to be accomplished.

We wish to re-emphasize that under both the MMPA and the ESA, recovery takes precedence over commercial interests. As stated in question #1,above, we support expanding research efforts on conflict avoidance to investigating this situation so that reasonable plans can be made.

For further information on sea otters and implications of P.L 99-625, we refer you to our colleagues at Friends of the Sea Otter. They can be reached in Carmel California at (408) 373-2747 or at P.O.Box 221220 Carmel Ca. 93922

Questions Pertaining to Lethal Takings.

Should H.R. 2760 specifically prohibit intentional shooting of marine mammals?

The answer to this question is "yes". In negotiations, fishing interests agreed to support this provision. Since both conservation interests and fishing interests agree on this point, it is difficult to argue against its inclusion.

The Pinniped Interaction Task Force

1) Adequacy of provisions to address fisheries interactions.

We were part of the negotiations with fishing interests that resulted in the Task Force concept. We supported institution of this Task Force to address the protection of endangered fish stocks from potentially devastating interactions with individually identified pinnipeds. We do not support its use to protect commercial interests. The legislation (H.R. 2760) itself does not exclude either situation.

2) Need for the Task Force.

There is a growing perception on the part of fishing interests that pinnipeds are having a devastating effect on fish stocks. We do not believe that research supports this notion (see end note below). However, we were willing to support the constitution of a Task Force to evaluate applications outlining conflict situations. The Task Force would provide an official mechanism to evaluate the nature and extent of any perceived problems and would be able to recommend possible solutions.

3) Need for More Specifics in the Task Force.

As we have previously stated, we believe that the Task Force should only address those situations in which there is a pinniped interaction that may be posing a threat to the survival of a fish stock. The MMPA is designed to protect marine mammals, not marine fisheries. As stated in our testimony, we also feel that the Task Force deliberations should be initiated by an applicant who brings before the task force, all necessary evidence on the nature and extent of the interaction. It is not clear in H.R. 2760 how this process is initiated. This aspect could be made more clear by requiring that task force deliberations be initiated by an application which contains all information necessary to evaluate the interaction.

4) Should the Task Force address solely interactions with salmonids ?

As previously stated, we believe that the task force should consider those situations in which marine mammals may be threatening survival of a fish stock. This need not be limited to salmonids if pinnipeds are posing a threat to a non-salmonid population of wild fish.

5) What kind of research is necessary?

Some research exists relative to the impacts of various sources on the decline of fish stocks. This research should be expanded. Before the Task Force can adequaterly determine the extent of the impact of pinnipeds, it is necessary to understand the interplay of a variety of factors including fishery takes, habitat degradation, interactions with hatchery fish and others. Once these interactions are understood, it may be possible to determine whether proposals to mitigate pinniped interactions will have any meaningful effect.

6) Adequacy of support in the development of non-lethal deterrents.

We do not feel that there has been adequate support. Furthermore, the past five years of the exemption program, which allowed lethal takes to protect gear and catch, encouraged lethal interactions. For these reasons we proposed and continue to support directed funding to establish a mitigation research program.

7) Monitoring of extent of direct interactions at sea.

It is not clear which interactions are meant in this question. If this question refers to interactions of pinnipeds with fish stocks at sea, then I believe that the Task Force could require such monitoring, but research indicates that interactions take place in coastal areas or in rivers and lakes. If the question refers to fisheries takes of these depleted fish stocks, then monitoring could be germane in this situation as well. Research has shown (see end note below)that the second most frequently cited reason for the decline of fish stocks is over-exploitation by commercial fisheries. These takes should continue to be monitored and regulated.

8) Should intentional lethal takes of pinnipeds be allowed?

Any intentional lethal take should be prohibited unless it is to protect life and limb; or if it is a permitted take which has been approved by the Task Force to prevent interactions from threatening the survival of a fish stock. If the removal of individually identified pinnipeds will safeguard the survival of a fish stock, then such a removal by agovernment agent is justified. However, predator control program (eg. coyote control) have shown themselves to be a failure in most instances, except where individually identified animals are posing a unique threat, and their removal will end that threat.

We would like to add an additional comment on pinniped interactions. A research study was done by the Endangered Species Committee of the American Fisheries Society.(Nelson, W., J. Williams and J. Lichatowich. 1991. Pacific Salmon at the Crossroads: Stocks at Risk from California, Oregon, Idaho and Washington. Fisheries. Vol. 16, No 2. pp 4-21.) In their review of 214 stocks of fish that were potentially endangered, the Committee found that habitat loss and destruction were the greatest reasons for declines in fish stocks. Specifically water diversions for agriculture, construction of dams and flood control devices, and siltation due to forestry practices were the biggest threats. Second to habitat destruction was over-exploitation by commercial fisheries. The third greatest factor was interaction with hatchery raised fish.

Poaching was considered a far greater threat than that posed by pinnipeds, which were cited as a possible secondary factor in decline of only one species. Out of a list of 25 factors which were implicated in the declines of these 214 fish stocks, only recreational activities and reduced reproductive success due to unknown factors were ranked lower than marine mammals. This study recommended an extensive list of actions designed to assist in recovery of fish stocks. The Committee included NO recommendation that marine mammals needed to be controlled.

We believe that science does not stand behind the perception of fisheries interests that pinnipeds are causing serious threats to fish, We also believe that the American people support the MMPA and its provisions to protect, not manage, marine mammals.

Thank you for this opportunity to address your concerns. We would be happy to assist you in the future if you have additional questions.

Sharon B. Young,
Wildlife Specialist,
International Wildlife Coalition

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Shur-Gain, St. George
Sea Farm Maine, Inc., Lubec
Trech Pots, Inc., South Portland
Trech's Island Fisheries, Lubec

The Honorable Gerry E. Studds
Chairman
U.S. House of Representatives
Committee on Merchant Marine and Fisheries
Room 1334, Longworth HOB
Washington, D.C. 20515-6230

September 8, 1993

Dear Congressman Studds:

Thank you for your letter of August 24, transmitting questions from Congressman Hamburgh concerning pinniped interactions and H.R. 2760, the Marine Mammal Protection Act Amendments of 1993.

I am enclosing a response to those questions, in behalf of the Maine Aquaculture Association. Also enclosed is a draft amendment to Section 7 of H.R. 2760 and a related letter to Dr. Nancy Foster, dated July 14, 1993.

We appreciate the opportunity to more fully articulate our serious need for changes to the Marine Mammal Protection Act along the lines of what we are suggesting in our response to your committee.

I continue to look forward to working with you and your staff as the next few weeks progress. If I can be of any additional assistance, please do no hesitate to contact me.

Please consider a visit to the Eastport, Maine area so that we can show off our exciting finfish aquaculture industry to you.

With best regards,

Sincerely,
MAINE AQUACULTURE ASSOCIATION

Jeffrey H. Kaelin
Government Relations Coordinator

Enclosures

16 Godfrey Drive • Box 6 • Orono, Maine 04473 • Telephone: 207/866-0161 • Fax: 207/866-0166
Founded in 1977, the Maine Aquaculture Association is a coalition of aquafarms, supply firms, and friends of aquaculture, dedicated to promoting industry growth through coordinated activities and public education.

ANSWERS IN RESPONSE TO REPRESENTATIVE HAMBURGH'S
QUESTIONS CONCERNING PINNIPED INTERACTIONS -
AUGUST 4, 1993 HEARING ON H.R. 2760
MARINE MAMMAL PROTECTION ACT AMENDMENTS OF 1993

FROM: JEFF KAELIN, GOVERNMENT RELATIONS COORDINATOR
MAINE AQUACULTURE ASSOCIATION

September 8, 1993

Should H.R. 2760 specifically prohibit intentional shooting of marine mammals?

The U.S. commercial fishing industry has generally agreed to a prohibition on shooting marine mammals, during the course of the wild harvesting of fish, because fisheries interactions with marine mammals in these circumstances are accidental. Commercial and recreational fishermen need to retain the authority to nonlethally deter marine mammals to protect against damage to gear and catch, however. Intentional lethal takes of marine mammals in wild harvest fisheries are so infrequent that a prohibition on shooting will have no significant negative impact on the industry.

In the marine finfish aquaculture industry, where the predation of cultured fish by individual pinnipeds from robust seal populations can be a significant economic problem, intentional lethal takes of certain marine mammals have occurred. It is very important that the MMPA reauthorization process recognizes that the intentional lethal taking of pinnipeds is an important management tool for salmon farmers which needs to be retained.

Intentional lethal taking is, and should be, used only as a last resort - after all other nonlethal means of deterrence have failed. We believe that takes should be below a "potential biological removal" level to insure that the viability of the marine mammal stock involved is not threatened. Existing law provides for this lethal take option. There is no scientific evidence that would indicate that the intentional lethal taking of predatory pinnipeds from robust populations - to protect against damage to gear and catch in the marine finfish aquaculture industry - should now be prohibited.

Many witnesses commented on the provisions in H.R. 2760 to establish the Pinniped Interaction Task Force. Would anyone like to comment further on:

1) the adequacy of these provisions to address interactions of commercial fishermen, fisheries and pinnipeds;

While H.R. 2760 does recognize that costly predation from robust seal stocks is occurring - by calling for a Pinniped Interaction Task Force - the proposal does not specifically

authorize the Secretary to permit limited intentional lethal takes if the Task Force were to recommend this option. It is important that this option be preserved during this reauthorization of the MMPA.

In addition to the salmon netpen predation by harbor and grey seals that is occurring in Eastern Maine, it is clear that the predation of wild salmon by seals in the Pacific Northwest is also a significant economic problem. We have suggested that H.R. 2760 specifically authorize that regional pinniped interaction (or intentional lethal taking) task forces be established because we believe that a regional approach to solving these problems will be most effective. This same regional approach has been suggested to consider solutions for limiting commercial fishing interactions with marine mammal stocks of critical concern.

We are attaching a draft amendment to H.R. 2760 (replacing Section 7 of the bill) that would establish a regional task force-based permitting system which we believe will work to strike a balance between conservation and economic loss. We encourage you to consider our amendment. It is based upon a June 15 proposal that was created by a few fishing and environmental groups in an attempt to address the West Coast predation problems mentioned above. The Maine Aquaculture Association did not agree to the June 15 proposal because it required the identification of individual predator animals before a permit could be issued. We envision a permitting system that would allow a reasonable take of animals to be authorized through a general permit that could be applied for either by individual farmers or by an organization in their behalf. The June 15 draft did not address pinniped predation problems in the aquaculture industry.

Also attached is a letter which the Maine Aquaculture Association sent to Dr. Nancy Foster, Acting Assistant Administrator of the National Marine Fisheries Service (NMFS), on July 14, asking for the immediate establishment of a regional Intentional Lethal Taking Task Force. We made this request because we believe that NMFS has the existing authority to establish such a task force and because we are concerned that an adequate permitting process may not be in place before this winter - when growers will again have to respond to the predation which we expect to occur at that time.

2) the need for a Pinniped Interaction Task Force;

As discussed above, the predation of both wild and cultured fish by individual pinnipeds from robust populations is an economic problem on both the east and west coasts of the United States. Existing law provides for the intentional lethal taking of marine mammals to protect against damage to gear and catch, after other, nonlethal, means have been employed and found not to be successful.

A regional task force approach to managing these predation problems provides a system that can consider all views and options and make a scientifically-based policy decision on how the problem may be solved. It is very important that the lethal take option be specifically included when the establishment of task forces is authorized this year.

3) the need for more specifics in setting up the Task Force such as a more detailed definition of the types of interactions to be addressed;

The amendment that we are proposing offers this specificity.

4) whether the Task Force should address interactions with fisheries other than salmonid fisheries;

The establishment of a task force should not be limited to interactions with salmonid fisheries. A task force should be authorized to be established to consider the predation of fish being raised in marine aquaculture facilities.

5) what kind of research is needed to ascertain the extent on the impact of pinnipeds feeding on salmonids as compared to the impact of commercial fishing harvest on these fish;

This question speaks to the predation of West Coast salmon, an issue which we have no background in. The answer to this question is best developed in the recommendations of a regional task force that would be established to consider this problem.

6) whether adequate support has been given to commercial fishermen in the development and proper use of nonlethal means of deterrents;

The task force option would provide for a cooperative approach - by government, industry, and other interested parties - to solving predation problems through a combination of lethal and nonlethal means. To date, this approach has not been available to our growers. Our industry utilizes all available, technologically feasible means of nonlethal deterrence and relies on lethal takes as a last-resort predator management tool. We welcome the opportunity to further investigate options through a task force-based permitting process.

7) whether the Pinniped Interaction Task Force should include monitoring on the extent of direct interactions at sea;

Our industry assumes that monitoring of the implementation of task force recommendations would take place. Our proposal would require the assistance of a wildlife management agency in carrying out any authorized intentional lethal takes. In Maine, this would probably work so that an animal control officer would be on

contract with the Maine Department of Marine Resources for this purpose. This individual or organization could be employed to monitor day-to-day interactions, in addition to removing pinnipeds identified as habitually exhibiting predatory behavior, should a task force make this recommendation and that recommendation is approved by the Secretary.

8) whether there are any circumstances under which intentional lethal takes of pinnipeds should be allowed.

As stated above, there is no scientific evidence to show that the intentional lethal removal of a limited number of pinnipeds from robust seal stocks should be prohibited. Existing law allows for intentional lethal takes of certain marine mammals to protect against damage to gear and catch without even considering the impact on the stock involved.

We ask the Committee to adopt a permitting system that will ensure that a stock is not negatively impacted but will allow fish farmers to cause individual predators to be removed in order to protect themselves from significant economic harm. Our long-term goal is to utilize nonlethal means of deterrence if the appropriate technologies can be developed. Today, however, all available nonlethal means of deterrence are being employed without solving the problem. Regulated, intentional lethal takes remain a short-term need. We believe that this need is sufficient to authorize their continued use.

Attachments:

* Draft amendment to Section 7 of H.R. 2760
* Letter to Dr. Nancy Foster, July 14, 1993

AMENDMENT TO H.R. 2760 PROPOSED BY THE MAINE AQUACULTURE ASSOCIATION, AUGUST 1993

Sec. 7. INTENTIONAL LETHAL TAKING OF PINNIPEDS

Section 101(a)(3)(B) is amended by replacing the word "depleted" with the word "critical".

Section 104 (16 U.S.C. 1374) is amended by adding at the end the following new subsection:

"(i.)(1) APPLICATION FOR THE INTENTIONAL LETHAL TAKING OF PINNIPEDS IDENTIFIED AS HABITUALLY EXHIBITING BEHAVIOR THAT CANNOT OTHERWISE BE DETERRED -- Any person may apply to the Secretary for a permit to intentionally lethally take these pinnipeds, when involved in the predation of a stock of fish that contributes to threatening the survival of that fish stock, or in the predation of fish being raised in marine aquaculture facilities.

(2) The application, using the best available information, shall include at least the following:

(a) A description of the species and stock, or stocks, of pinniped involved, including population size estimates, estimates of population trends, and a description of feeding habits;

(b) If the predation is occurring with a stock of fish, a description of the species and stock of fish involved, including population size estimates and estimates of population trends;

(c) A detailed description of the predation, including the specific location, or locations, of the predation, how the predation is occurring, when it occurs, and an estimate of how many animals are involved in the predation;

(d) An estimate of the economic loss of gear or catch, or an estimate of the economic loss of fish being raised;

(e) A description of the environmental costs and benefits associated with the proposed lethal take, including an assessment of any other significant contributors to the problem that the predation is believed to be causing, and the direct and indirect relationships between the pinnipeds and the affected stock of fish or fish being raised; and

(f) A specification of the expected long-term and short-term benefits of the lethal removal of the pinniped or pinnipeds involved in the predation.

(3) SECRETARY'S REVIEW OF APPLICATION - The Secretary shall

review the application and determine, within 30 days of receipt, whether it presents information that, in the Secretary's estimation, warrants the convening of a Regional Intentional Lethal Taking Task Force. If the Secretary determines that the applicant has produced sufficient information to warrant the convening of a Task Force, he or she shall immediately publish a notice to that effect in the Federal Register requesting information and comments concerning this decision.

(4) REGIONAL INTENTIONAL LETHAL TAKING TASK FORCES

(a) TASK FORCE MEMBERS - Regional Intentional Lethal Taking Task Forces shall consist of members appointed by the Secretary, and shall include members drawn from the Secretary's staff, reputable scientists who are knowledgeable about the predation that the application addresses, affected conservation and fishing community organizations, and such other sources as the Secretary deems appropriate;

(b) TASK FORCE MEETINGS - Task Forces shall meet no later than 30 days after the Secretary's notice is published in the Federal Register and shall consider the application and the information and comments provided in response to the Federal Register notice. The Task Force may hear oral testimony at this time. After considering all pertinent information, the Task Force shall determine whether the lethal taking of the pinniped or pinnipeds is warranted and recommend non-lethal alternatives or lethal takings, in response to the application, to the Secretary.

(c) TASK FORCE RECOMMENDATIONS - Within 30 days of its first meeting, a Task Force shall develop its recommendation, subject to the following conditions.

(1) A Task Force may recommend that no action be taken or that only non-lethal alternatives be implemented;

(2) In recommending intentional lethal taking, the Task Force shall, based upon all information available to it, describe the following conditions.

(a) The number of animals proposed to be lethally taken including, if applicable, a description of any specific individual pinnipeds proposed to be lethally taken

including the appropriate age and sex of the individual animal or animals, and any natural or other markings or means of identification or the particular individual animal or animals;

(b) The location, time, and method of the recommended lethal taking, together with the identity of the wildlife management agency which shall have the authority to carry out the taking;

(c) Criteria for evaluating whether the lethal taking accomplishes the purpose for which it is authorized; and

(d) The duration of the authority for the intentional lethal taking.

(5) SECRETARIAL DECISION - Within 15 days after the receipt of a Task Force recommendation, the Secretary shall issue a decision on the application. The Secretary may reject the application, allow the implementation of non-lethal alternatives to the proposed intentional lethal taking, or issue a permit for the intentional lethal taking.

(6) REPORT TO THE TASK FORCE - Any party authorized to carry out an intentional lethal taking utilizing this permitting procedure shall report its actions to the Task Force.

(7) TASK FORCE EVALUATION - The Task Force shall evaluate the success of any intentional lethal takings carried out in response to an application. Depending on the nature of the predation problem being addressed, the Task Force may need to monitor the situation for two or more years before determining the success or failure of the actions taken. In the event that the Task Force concludes that the actions taken are not successful in addressing the predation problem for which they were proposed, the Task Force may recommend additional actions to the Secretary. In the event that the Task Force concludes that the actions taken were successful, the Secretary shall be notified and shall disband the Task Force."

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Sea Farm Maine, Inc., Lubec
Tech Pak, Inc., South Portland
Trask's Island Fisheries, Lubec

Dr. Nancy Foster
Acting Assistant Administrator
National Marine Fisheries Service
1335 East-West Highway
Silver Spring, MD 20910

July 14, 1993

Dear Dr. Foster:

In behalf of the Maine Aquaculture Association (MAA), I am writing to ask you to assist Eastern Maine's salmon netpen industry as it attempts to respond to a serious harbor and gray seal predation problem that is taking a significant, annual economic toll.

As the attached article from the May 17, 1993 Bangor Daily News explains, "salmon farming has had a profound (economic) effect on (this) area". This year, the MAA's finfish committee has identified reducing the economic impact of seal predation as its first priority.

During the winter months of the past two or three years, Maine's $50 million salmon netpen industry has experienced losses from seal predation that are estimated to be as high as $5 million each year. Now that the presence of the industry has stabilized in Eastern Maine, seal predation incidences are increasing. Efforts are already underway in this state to attempt to grow both halibut and cod in marine waters. As the marine finfish aquaculture industry in this region grows, we can expect these predatory attacks to become an even greater problem.

Recently, funds have been made available from the state-supported Maine Aquaculture Innovation Center (MAIC) to assist growers in addressing the situation.

On April 15, a portion of these funds were used when Maine's salmon aquaculture industry held a Predator Control Seminar in Eastport, Maine. In addition to Maine participants, individuals from British Columbia, Nova Scotia, and New Brunswick, Canada shared their knowledge of harbor and grey seal behavior and discussed non-lethal means of deterring seal predation occurring around marine finfish aquaculture facilities.

16 Godfrey Drive • Box 4 • Orono, Maine 04473 • Telephone: 207/ 866-0161 • Fax: 207/ 866-0166
Founded in 1977, the Maine Aquaculture Association is a coalition of aquafarms, supply firms, and friends of aquaculture, dedicated to promoting industry growth through coordinated activities and public education.

The proceedings of this conference are now being published by the MAIC. As soon as they become available, I will make sure that you receive a copy. The results of the seminar confirmed that, even though all available non-lethal means of deterrence are being employed, the periodic intentional lethal take of individual seals is a necessary tool for the continued success of this industry.

Because this marine mammal/commercial fisheries interaction is of concern to this new Maine fishing industry, the MAA asked me to participate in the discussions between fishing industry and environmental organization representatives that began in February, and concluded recently, when two proposals to amend the Marine Mammal Protection Act were communicated to Capitol Hill.

The second of these proposals, which concerns the "Intentional Lethal Taking of Pinnipeds", does not meet the needs of Maine's finfish aquaculture industry. A copy is enclosed. Even though the MAA participated in these facilitated discussions for more than three months, our efforts to develop a regulated permitting system - that would allow for the intentional lethal taking of animals to protect gear and catch in the marine finfish aquaculture industry - ultimately failed.

Today, we must work with the National Marine Fisheries Service and the Congress to develop a process - before the seasonal behavior of some harbor and gray seals needs to be deterred again this winter - that will be successful. Both Congress and NMFS has a record of supporting the limited intentional lethal taking of abundant marine mammals to mitigate a demonstrable significant negative impact to a fishery.

We are concerned that the ongoing reauthorization of the Marine Mammal Protection Act may not produce an opportunity for marine finfish growers to develop a legal strategy for coping with the impact of abundant and growing seal populations in Eastern Maine.

In order to avoid this outcome, we ask that NMFS immediately establish an informal, regional "Intentional Lethal Taking Task Force". This group would begin to meet to consider the possible authorization of a general permit for the salmon netpen industry.

The suggestion that regional task forces be established to consider permit applications for the taking of some animals is supported in the second "agreement" between some environmentalist and fishery groups to which I referred earlier. We believe that NMFS has the existing authority to begin to examine this problem today.

This "agreement" also would require the assistance of a "wildlife management agency" in the taking.

The MAA supports these two areas of cooperative thought but recognizes that the agreement's requirement that individual animals be identified before the beginning of a 135 day review period does not constitute a workable permitting process for the salmon netpen industry.

I hope that our goals have been made clear to you by this petition. We would be pleased to work with you and your staff to develop any additional information that may be pertinent to the process that we are suggesting.

Thank you for your attention to and your consideration of our request.

With best regards,

Sincerely,
MAINE AQUACULTURE ASSOCIATION

Jeff Kaelin
Governmental Affairs Coordinator

Enclosures

CC: Maine Congressional Delegation
Commissioner William Brennan
Richard Roe
Dr. Michael Payne
Dr. Douglas Beach
Maine Aquaculture Association

Monday, May 17, 1993

Salmon industry poised for No. 1

New markets, technology propelling young enterprise

LUBEC (AP) — Maine's expanding fish-farming industry, which tripled since the 1990 harvest, is poised to surpass lobster as Maine's most valuable ocean resource this year or next, fisheries experts say.

Fish farmers harvested about 13.5 million pounds of fish last season — 12.9 million pounds of salmon and 600,000 pounds of trout. The harvest was valued at close to $50 million.

The enterprise is now maturing, with new markets, new technology and new ways to add value to the product.

Jim Anderson, a professor at the University of Rhode Island who for years has studied Maine's fish farming, said the industry is entering a "mature phase."

"Maine," he said, "can continue to expand."

James Wilson, a professor at the University of Maine who also has studied the marketing of salmon, agrees with Anderson, but with a big "if." "It all depends on the market," he cautioned.

Inside a former sardine cannery, workers pack whole, 10-pound Atlantic salmon into boxes that will be shipped to different points across the country.

Across the room, another group of workers skin and bone salmon fillets with special machines, then cut the fish into precise portions destined for dinner trays on American Airlines flights.

"This is the future," said Colin McLernon, president of Eastport-based Maine Pride Salmon Inc., as he watched workers measure out portions of salmon for the airline. "This will give us the steady, stable industry we need."

Robert J. Peacock II, general manager of R.J. Peacock Canning Co. in Lubec, said salmon — along with sea urchins — has transformed Lubec from a dead-end town to a flourishing community.

Peacock in 1992 processed 3 million pounds of salmon for seven companies; this year the amount will rise to 5 million pounds.

"Salmon has changed the mindset — not just the economy, but the way people think here," he said.

In the late 1980s, state officials predicted that by 1993 farm-raised salmon would be worth nearly $100 million, far exceeding the value of lobster and approaching the value of all other wild fisheries combined.

Overexpansion caused the state's leading fish farm to be sold to a Canadian company a couple of years ago. Other farms were involved in a legal dispute about the trade practices of the Norwegian salmon industry.

A glut of salmon worldwide caused a price plunge in 1989 that nearly devastated the Maine salmon industry. This past winter, more than 200,000 salmon froze to death when the water temperature dropped below freezing.

That has changed.

According to the Maine Aquaculture Innovation Center, salmon farming now provides 350 full-time jobs, 200 part-time jobs and 100 full-time equivalent positions.

A new bank, a new grocery store and a new motel have opened in Eastport, a town of 1,989 that had several boarded-up buildings downtown a few years ago.

Owen Lawler, who is active in the Chamber of Commerce and built the Motel East three years ago, said salmon farming has had a profound effect on the area.

"I don't think the average person realizes how big this industry is getting," he said.

Traditionally, fish farmers have sold whole salmon to their buyers, who then cut them into steaks and fillets for retail sale for menu items. But now, the farms are testing their own new products, such as frozen salmon.

The only frozen salmon now sold in the United States is wild pink salmon from Alaska.

In Lubec, Peacock will soon have a sophisticated $250,000 machine that will bone and fillet salmon with less labor. He also is developing a freezing technique to develop a line of frozen salmon products, something not done in Maine now.

At Maine Pride, for example, McLernon since November has been selling pre-cut, 95-gram fillets that are eventually served on American Airlines' flights.

The simple act of filleting adds 40 percent to the value of salmon. Last week, United Airlines also agreed to serve Maine salmon on some of its flights.

"We're at the tip of the iceberg of developing a world-class food industry," McClernon said.

TROUT UNLIMITED
Charles F. Gauvin
President
Chief Executive Officer

AUG 0 6 1993

August 4, 1993

The Honorable Gerry E. Studds
Chairman
Committee on Merchant Marine and Fisheries
U.S. House of Representatives
Washington, DC 20515

Re: Comments on the "Marine Mammal Protection Act (MMPA) Amendments of 1993," H.R. 2760.

Dear Chairman Studds:

On behalf of Trout Unlimited, I am writing to express our concerns about the above referenced bill, which is the subject of a hearing that you are conducting today under your leadership as Chairman of the Subcommittee on Environment and Natural Resources. I request that you include this letter in the hearing record.

By way of background, Trout Unlimited (TU), through its Washington state council, the Northwest Salmon and Steelhead Council, has participated in the Industry-Environmental Negotiating Group over the past five months. TU believes, as do many members of this group, that great progress has been made in developing workable solutions to the vexing problems produced by marine mammal and fisheries interactions. These solutions are articulated in the "Conservation and Fishing Community Final Negotiated Proposal for a Marine Mammal Research and Conservation Program to be Enacted Through the Marine Mammal Protection Act Reauthorization of 1993" and "Intentional Lethal Taking of Pinnipeds" agreements. It has always been our hope and goal that Congress would use the products borne of these difficult negotiations as the basis for amending the MMPA in the reauthorization process.

Upon reviewing H.R. 2760, it is clear to us that you have considered the provisions of the negotiated agreements and have taken steps to include its concepts in a constructive manner. However, the bill fails to address key concerns of ours that were addressed in the negotiated agreements.

First, Section 7 of the bill does not provide the Secretary of Commerce with authority to permit --following full public review and appropriate task force recommendation --lethal takings of problem pinnipeds. Section 7 does authorize a "Pinniped Interaction Task Force" to study and make recommendations concerning problem pinnipeds that are "dangerous or damaging to salmonid fishery resources," but then fails to allow the Secretary to act on those recommendations. In contrast, the "Intentional Lethal Taking" negotiated agreement does allow the Secretary to permit lethal taking of problem pinnipeds after an appropriate task force recommendation and public review and comment.

Second, Section 7's provisions for guiding Task Force deliberations do not provide sufficient detail and focus to the problem. In our view, the "Intentional Lethal Taking"

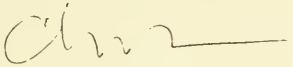
negotiated agreement language does a better job in dealing with this complex issue than does Section 7.

Speedy resolution of this issue is critical to us because of the near extinction of the Cedar River stock of steelhead passing through Ballard Locks in Seattle. Evidence in this case is very strong that sea lion predation occurring in the Locks has produced dramatic declines in stock run size, down to an estimated 150 returning adults from several thousand as recently as the mid-1980's. Many different non-lethal techniques have been used in attempting to resolve this situation; all have failed to date. As Congress and nation struggle to preserve our fish and wildlife diversity, it appears to us that appropriate changes in the MMPA can help the cause in this situation. In our view, the "Intentional Lethal Taking" negotiated agreement provides the best tool for this situation, and others like it which may arise in the future.

Finally, I urge you and the Subcommittee to join with members of the Negotiating Group to revisit other key points of the agreements that were left out of this bill or were modified in such a way as to be inconsistent with the agreements. It is my understanding that these points will be raised today by several witnesses who are signatories to the agreements. I urge you to consider these points, and concerns raised in this letter, prior to concluding your work on this bill in the House side of the reauthorization process.

Please be assured that you have TU's full support and assistance as you work to resolve issues in the MMPA reauthorization, Endangered Species Act reauthorization, Clean Water Act reauthorization, and other fish and wildlife conservation items on your very full Committee agenda. We are committed to preserving our nation's rich heritage of biological diversity, and pledge to work with you to minimize the many threats facing this heritage.

Sincerely yours,



Charles F. Gauvin

cc. Members of the Subcommittee on Environment and Natural Resources

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